Supreme Court, U.S.
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Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Petitioners,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services, et al.,
Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,
Respondent.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the Tenth Circuit and for the Federal Circuit

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JOINT APPENDIX
Volume I

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CERTIORARI GRANTED MARCH 22, 2004

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-7106

CHEROKEE NATION AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Appellants,

v.

UNITED STATES OF AMERICA; TOMMY THOMPSON, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Appellees.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
8/13/01	1	[1438890] Civil case docketed. Preliminary record filed. DATE RECEIVED: 08/13/01. Transcript order form due 8/23/01 for Stephen D. Allen. Docketing statement due 8/23/01 for Shoshone-Paiute and for Cherokee Nation. Notice of appearance due 8/23/01 for Michael H. Trujillo, for G. Thompson, for Shoshone-Paiute, for Cherokee Nation. (bjv)
11/26/02	55	[1566374] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Murphy; Anderson, authoring judge; Baldock. [01-7106] (bjv)

DATE	NO.	PROCEEDINGS
1/6/03	56	[1576081] Petition for rehearing in banc filed by Cherokee Nation and Shoshone-Paiute. Original and 15 copies. c/s: y (lg)
1/22/03	69	[1580723] Order filed by Judges Murphy, Anderson and Baldock denying motions for leave to become amicus [1578924-1], filed by Ramah Navajo Chapter, et al. [1577809-1], [1577331-1], denying Petition for rehearing in banc [1576081-1] (lg)
4/5/04	75	[1698670] Supreme Court order dated 3/22/04 granting certiorari filed. (oac)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA, and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,
Plaintiffs,

v.

UNITED STATES OF AMERICA; DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
3/5/99	1	COMPLAINT (sb) [Entry date 03/08/99]
4/5/99	3	NOTICE mailed setting case for Status & Scheduling Conference on 4/29/99 at 2:00 p.m. at the United States Courthouse, Muskogee, Oklahoma before the Honorable Frank H. Seay. ENTERING ORDER by Judge Frank H. Seay directing parties pursuant to Rule 26(e), to meet as soon as practicable, but not less than 14 days prior to the Status and Scheduling Conference to discuss the nature and basis of claims and defenses, the possibility of prompt settlement and, consent to proceed before a United States Magistrate Judge. Parties are directed to file with the Clerk of Court a

DATE	NO.	PROCEEDINGS
		joint written report of such meeting four (4) working days prior to the Status and Scheduling Conference. Attorneys shall make known to their clients the contents of the report. The enclosed "Report on Planning Meeting Form", is to be completed and filed with the Clerk. All parties and their counsel are required to sign this form. The signatures of the parties may be submitted by facsimile. (FHS) (cc: all counsel) (law) [Entry date 04/05/99]
4/21/99	4	JOINT MOTION for continuance of the Status & Scheduling Conference and the date for filing joint Report on Planning Meeting. (sg) [Entry date 04/22/99]
4/23/99	6	MINUTE ORDER: denying joint motion for continuance of the Status Scheduling Conference and the date for filing joint Report on Planning Meeting. (FHS) [4-1] (cc: all counsel) (tc) [Entry date 04/23/99]
5/17/99	11	AMENDED COMPLAINT [1-1] by plaintiffs (tl) [Entry date 05/18/99]
6/7/99	13	ANSWER by defendants to plaintiffs' complaint [1-1] (law) [Entry date 06/08/99]
7/23/99	19	MOTION by plaintiffs for summary judgment on the Third Cause of Action ; response deadline 8/9/99 (tl) [Entry date 07/23/99]
7/23/99	22	MOTION by plaintiffs for partial summary judgment of liability on the first and second causes of action ; response deadline 8/9/99 (tl) [Entry date 07/23/99]

DATE	NO.	PROCEEDINGS
7/23/99	24	EXHIBITS by plaintiffs in support of Motion for partial summary Judgment on First and Second Causes of Action [23-1] (tl) [Entry date 07/23/99]
9/7/99	35	MOTION by defendants for summary judgment; response deadline 10/19/99 (ct) [Entry date 09/08/99]
9/7/99	39	MEMORANDUM by defendants in support of motion for summary judgment, and in opposition to plaintiffs' motions for summary judgment (ct) [Entry date 09/08/99]
2/9/01	148	ORDER by Judge Frank H. Seay denying plaintiffs' motion for class certification and for approval of class notice [81-1] (cc: all counsel) (tc) [Entry date 02/12/01]
6/25/01	161	ORDER by Chief Judge Frank H. Seay denying plaintiffs' motion for summary judgment on its first and second causes of action [46-1], denying plaintiffs' motion for summary judgment for a declaratory action regarding Section 314 and granting defendants' motion for summary judgment [35-1] (cc: all counsel) (lw) [Entry date 06/25/01]

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Indian Health Service Refer to: OTA
Rockville, Maryland 20857

INDIAN SELF-DETERMINATION
MEMORANDUM NO. 92-2

CONTRACT SUPPORT COST POLICY

Sec.

1. Background
2. Purpose
3. Definitions
4. New and Expanded Contracts
5. Procedure for Computing Amount of Contract Support Costs
6. Ongoing Contracts
7. Subsequent Years Considerations
8. Supersession

1. BACKGROUND

The development of this policy is in response to section 106(a) of Public Law 93-638, as amended, the Indian Self-Determination Act, which states:

> Section 106. (a)(1) "The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the program or portions thereof for the period covered by the contract.
>
> (2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

2. PURPOSE

To establish the Indian Health Service (IHS) policy for 1) identifying amounts required for direct and indirect contract support funds; and 2) allocating contract support funds for all Public Law (P.L.) 93-638 contracts. All funds for contract support costs are subject to the availability of funds made available for this purpose.

This policy outlines the procedures to be used to determine the need for contract support costs, and to guide the allocation of these funds.

3. DEFINITIONS

Contract Support Costs are:

A. Reasonable costs for activities which must be carried on by the Indian tribe or tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management but which normally are not carried on by the Secretary in his direct operation of the program, or are provided by the Secretary in support of the program from resources other than those under contract; and

B. Costs which are reasonable, necessary and allowable costs of the contractor, which are allocable to the contract based on applicable Federal cost principles; and

C. Costs which are not provided for under the allocation of program funds available for the contract as defined in P.L. 93-638, as amended, Section 106 (a)(1); and

D. Treated as either direct or indirect by the contractor based on applicable cost principles and the contractor's cost allocation policy.

4. NEW AND EXPANDED CONTRACTS

A. The Indian Self-Determination (ISD) Fund will cover certain costs of P.L. 93-638 awards when the award is:

(1) an initial transfer of a program previously operated by the IHS to the tribe or tribal organization, or

(2) to expand current tribal operations through the assumption of additional programs previously operated by IHS, or

(3) to provide initial contract support funding for all new and expanded 638 contracts, including the assumption of programs previously operated by other tribes, tribal organizations, Indian contractors, and for newly recognized tribes.

B. IHS will award funds for contract support costs for new and expanded contracts in the following two categories:

(1) Direct Contract Support Costs:

a. Non-recurring direct contract support costs are costs which are of a non-recurring nature, are otherwise allowable direct contract support costs, and are required for the program to begin operations. These are also referred to as start up costs, but are not intended to be an additional cost category.

b. Recurring direct contract support costs are costs which are of a recurring nature and associated directly with the operation of the program. These funds shall be awarded on a recurring basis.

(2) Indirect or Indirect Types of Costs:

Costs incurred for a common or joint purpose benefitting more than one contract objective, or which are not readily assignable to the contract objectives specifically benefitted without effort disproportionate to the results achieved, and which are not funded by other direct costs, and are incorporated in the Indian tribe's or tribal organization's indirect costs reimbursement procedure as negotiated annually with the cognizant Federal agency.

For contractors without negotiated indirect cost rates, indirect-type costs consist of costs which are normally found in indirect cost pools of contractors with rates, and which are negotiated between the contractor and the Area Office using principles of reasonableness, allowability and allocability (see attachment A).

These funds shall be awarded "non-recurring" subject to negotiation in each subsequent year. Those contractors with a surplus of indirect cost support funds will not be allocated additional funds until the need is indicated by the most current negotiated indirect cost rate. (See page 7, Section 6, for special procedures for contracts that have received indirect cost funds as recurring funds). The following illustrations show: 1) total funding for the first year of the contract, and 2) contract costs for subsequent years.

Total funding for first year of the contract

Program Funding Base (106(a)(1) amount)	
Direct Contract Support Costs (Recurring)	Contract support costs provided from ISD fund
Indirect Contract Support costs (non-recurring)	

Contract Costs for Subsequent Years

Direct Costs (recurring)	Receive mandatory increases
Indirect Costs (non-recurring)	Recomputed each year

(3) In subsequent years, direct contract support funds will be considered part of the recurring base of the contract, and will receive mandatory cost increases as do the direct program funds. Amount of indirect contract support funds must be justified each year based on negotiated amounts and any shortfalls are reported to IHS Headquarters for inclusion in the Annual Report to Congress on implementation of P.L. 93-638.

C. (1) Funds for new and expanded contracts will be allocated by IHS Headquarters from the ISD fund on a monthly basis until expended. If permitted by appropriations act, any funds that remain at the end of the fiscal year will be added to any ISD Funds available in the subsequent year. If funds are exhausted at any point in the fiscal year, requests received thereafter will be considered first for funding in the subsequent year from funds appropriated for this purpose.

(2) Area Offices will make requests after receiving proposals for new and expanded contracts. Areas are encouraged to begin discussions with the proposing tribe or tribal organization early to identify the amount of *need* for contract support costs according to procedures detailed in Section 5 of this policy.

Once the amount of need has been identified, and before the end of the 60-day proposal review period, a request for this amount will be submitted to the IHS Office of Tribal Activities, Division of Self-Determination Services to determine if funds are available for this purpose. The Office of Tribal Activities will respond immediately to advise if the funds are available.

While a CSC need may be requested which is greater than the amount determined to be available, the available amount will be the basis for consideration of approval or declination of proposals, and any subsequent award. Deficiencies for existing contracts will be included in the annual report to Congress required by Section 106(c) of the Act.

(3) The requested amount will be the total of indirect and direct contract support costs for each project.

(4) If funds from the ISD Fund are inadequate to fully fund all requests, then requests to be funded that month will be selected based on the earliest receipt date.

5. PROCEDURE FOR COMPUTING AMOUNT OF CONTRACT SUPPORT COSTS

A. Direct Contract Support Costs

For new and expanded contracts, Area Offices will identify the amount needed for direct contract support costs in accordance with the following:

A detailed budget will be prepared for first-time contractors (new and expanded) detailing amounts to be considered as direct program funds, indirect and indirect type contract support costs, and direct contract support costs.

The amount of recurring direct contract support costs will be determined by negotiation between the recipient and the Area Office (see definitions section for direct contract support costs). *Only categories of cost, which are not contained in either the indirect cost pool or the amount computed pursuant to Section 106(a)(1) can be considered as direct contract support costs.* The Area Offices and recipients must agree on the amount of direct contract support costs which will be recurring in future years.

"Recurring" direct contract support costs which may not be in a contractor's indirect cost pool are:

- Unemployment tax on direct program salaries.
- Workers compensation insurance on direct program salaries.
- Cost of retirement and other fringe benefits for direct program personnel in excess of amount funded within P.L. 93-638, as amended, Section 106 (a)(1).
- Long distance telephone charges.
- Postage allocable to direct programs.
- Discipline specific training for direct program personnel not funded in the 106 (a)(1) amount.

The Area Office will also work with the contractor to identify non-recurring direct contract support costs necessary as one time start up costs. These must be required to begin operations. They are not intended to be a program enhancement, and cannot be items of cost included in the 106(a)(1) amount. Examples may include the following:

- Purchase of computer hardware and software.
- Required training and staff development.
- Systems development.
- Equipment and furniture.

Items listed above as examples of recurring and non-recurring direct contract support costs must be justified as such and negotiated with the Area Office. Items not included as examples above, but requested and justified by contractors shall be submitted by the Area Office to IHS Headquarters, Division of Self-Determination Services, for approval. This will contribute to greater consistency from Area to Area.

A single item of cost to be funded shall not be accounted for both in the computation of direct costs, and also in the computation of indirect or indirect-type costs. However, a type of cost may be either direct or indirect depending on the level or function of the organization to which it applies. The Area Office shall ensure that costs are reasonable, necessary, and not duplicative.

To the extent that the Area Office and the contractor cannot agree on an item(s) of cost, the disputed items shall be submitted to the Director, IHS, through the IHS Office of Tribal Activities, Division of Self-Determination Services.

The following is a description of the methodology to be used in computing the amount required for indirect contract support costs.

B. Indirect or Indirect Type Costs

For all contractors, Area Offices will identify the amount required for indirect costs of awards (12 months of operation) for each contract as follows:

(1) Recipients with Established Indirect Cost Rates

The amount of indirect costs expected to be incurred under awards by recipients with rates which have been negotiated or are being negotiated

with the cognizant Federal agency will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose

(2) Recipients without Established Indirect Cost Rates

Indirect types of costs may be computed by negotiating amounts for the following examples of "indirect-types of costs" listed on the following page. These examples are those most commonly found in the indirect cost pools of recipients with rates. The total amount negotiated for these items will be considered as the recipient's indirect cost for purposes of this allocation procedure.

Management and Administration	Facilities and Equipment	General Services and Expenses
Governing Body	Building Rent/Lease/ Cost Recovery	Insurance and Bonding
Management and Planning	Utilities	Legal Services
Financial Management	Housekeeping/Janitorial	Audit
Personnel Management	Building and Grounds	General Support Services
Procurement/Material Management	Repairs and Maintenance	
Human Resources Management	Equipment	
Records Management		
Property Management		
Data Processing		
Office Services		

Guidelines for the Principles Involved in Negotiating Indirect Costs

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the contracted program. All indirect costs included in the plan will be supported by accounting records which will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the contractor, and contain, but not necessarily be limited to 1) the nature and extent of services provided and their relevance to the contracted program, 2) the items of

expense to be included in the indirect cost pool, and 3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB), Circular No. A-87, Cost Principles for State and Local Governments, establishes principles and standards for determining indirect costs applicable to contractors (local governments and federally recognized Indian tribal governments). Further, the circular discusses allowable and unallowable indirect costs.

6. ONGOING CONTRACTS

The amount of indirect contract support funds representing the previous year's base will be distributed to Areas "recurring" to fund each Area's indirect cost need. Each contractor's need for indirect contract support shall be determined by calculating changes, if any, in indirect cost rates, bases, and pools. If funds available in the Area's indirect cost base are not adequate to meet total requirements, then the amount available shall be distributed according to each contractor's proportion of total need. These funds will be awarded to the contractor as non-recurring funds. (See 4.A(3) for treatment of direct contract support costs.)

Each year, Areas are required to report additional needs for indirect contract support funds beyond the amount provided in their previous year's recurring base, or any surplus of funds provided in their recurring base based on current year needs.

Transition Period

Some Areas have previously allocated indirect contract support funds as recurring funds to contractors. However, the purpose of this policy is to establish a uniform allocation process for indirect contract support funds, and

will result in these funds being allocated as non-recurring funds to contractors *Agency wide*.

It is not intended for Areas to reduce contract amounts of indirect contract support funds previously allocated as recurring funds without the approval of the contractor. Those contractors with a surplus of indirect contract support funds will not be allocated additional indirect contract support funds until their most current negotiated indirect cost rate indicates an additional requirement for these funds. Mandatory increases for self-determination contracts should be provided only on the recurring base amount (excluding indirect contract support) since actual needs will be negotiated each year for the indirect cost amounts.

7. SUBSEQUENT YEARS CONSIDERATIONS

A. Areas shall maintain a historical record of funds awarded in each of the following categories:

   a) direct program funds

   b) direct contract support funds

   c) indirect cost funding

   d) indirect-type cost funding

B. Federal indirect cost negotiators should be requested to highlight changes, if any, in the contractor's annual cost allocation plan (treatment of items of cost) as an exhibit to the negotiated indirect cost agreement.

C. Contractors and Area Offices must re-negotiate the contractors indirect type cost budget annually if the contractor does not have a formal negotiated indirect cost rate.

D. The same cost allocation rules applying to those contractors with formally negotiated indirect cost agreements will be applicable to those contractors without formally negotiated indirect cost rates.

8. SUPERSESSION

This issuance supercedes any policies or instructions previously issued regarding the allocation of Contract Support Funds.

/s/ Everett R. Rhoades,
EVERETT R. RHOADES, M.D.
Assistant Surgeon General
Director

ATTACHMENT A

PRINCIPLES OF REASONABLENESS, ALLOWABILITY AND ALLOCABILITY

REASONABLE COSTS

A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of the reasonableness of specific costs must be scrutinized with particular care in connection with contractors or separate programs thereof which receive the preponderance of their support from awards made by Federal agencies. In determining the reasonableness of a given cost, consideration shall be given to:

a. Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the contractor or the performance of the contract.

b. The restraints or requirements imposed by such factors as generally accepted sound business practices, arms length bargaining, Federal and State laws and regulations, and terms and conditions of the contract.

c. Whether the individuals concerned acted with prudence in the circumstances, considering their responsibilities to the contractor, its members, employees, and clients, and the Government.

d. Significant deviations from the established practices of the contractor which may unjustifiably increase the contract costs.

ALLOCABLE COSTS

A cost is allocable to a particular cost objective in accordance with the relative benefits received. A cost is allocable to a contractor if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

1) Is incurred specifically for the contract.

2) Benefits both the contract and other work and can be distributed in reasonable proportion to the benefits received.

3) Is necessary to the overall operation of the contract, although a direct relationship to any particular cost objective cannot be shown.

Any cost allocable to a particular contract or other cost objective under these principles may not be shifted to other Federal contracts to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the contract.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
PUBLIC HEALTH SERVICE
INDIAN HEALTH SERVICE
ROCKVILLE, MARYLAND 20857

REFER TO: OAM

INDIAN HEALTH SERVICE CIRCULAR NO. 96-04

CONTRACT SUPPORT COSTS

Sec.

1. Purpose
2. Authorizing Legislation
3. Definitions
4. Process
5. Supersedure
6. Effective Date

Circular Exhibit 96-04-A: Section 106, Indian Self-Determination and Education Assistance Act, as Amended

Circular Exhibit 96-04-B: Contract Suppost Costs Calculated Using the 80/20 Method

Circular Exhibit 96-04-C: Contract Support Costs Calculation Based on a Detailed Analysis

1. PURPOSE. The purpose of this circular is to provide instructional guidance on:

   - Determining amounts of start-up, direct, and indirect contract support costs (CSC)
   - Allocating pools of Indian Health Service (IHS) funding available for CSC
   - Prioritizing tribal requests for funding of CSC
   - Reporting by the IHS to all tribes and to the Congress

These instructions are not regulations establishing program requirements and are not intended to bind agency personnel. These instructions are intended to provide guidance to IHS personnel to determine and allocate CSC, while allowing judgment and prudence in individual circumstances.

2. AUTHORIZING LEGISLATION. This circular is authorized pursuant to the Transfer Act, title 42 United States Code (USC) §2001 and implementing regulations in Title 42 of the Code of Federal Regulations §36.3. The development of this circular has involved the active participation of representatives from Indian tribes. Since 1992, the procedures discussed in this circular have been applied to contracts awarded pursuant to Title I of the Indian Self-Determination and Education Assistance Act, Public Law (P.L.) 93-638, as amended. The CSC process has also been applied to compacts awarded to tribes that have been selected to participate in the Tribal Self-Governance Demonstration Project (SGDP) pursuant to Title III of P.L. 93-638, as amended. Section 106 of P.L. 93-638, as amended, authorizes funding for all Indian Self-Determination (ISD) and Self-Governance agreements under the Act. Section 106 is provided as Exhibit 96-04-A to this circular, and is cross-referenced to the pertinent sections where instructions or examples have been provided.

3. DEFINITIONS.

   A. Award. An agreement authorized under Title I (contract) or Title III (compact) of P.L. 93-638, as amended.

   B. Awardee. A recipient (tribe or tribal organization) of an award as defined above.

   C. Contract Proposal. Refer to the regulations implementing P.L. 93-638, as amended, and Title 25, USC.

D. Recurring Funds. Contract or compact funds that do not require rejustification each year to the Secretary. Annual increases are provided through congressional mandatory increases or other resource allocation methodologies applicable to the respective funding category of the award.

E. Non-Recurring Funds. Funds that require a rejustification annually, and are awarded based upon an annual resource allocation methodology that considers or is dependent upon other factors (e.g., an indirect cost rate applied to a direct program base that may change the amount to be reimbursed from a single agency as the programs under contract continue to increase).

F. Programs, Functions, Services, and Activities (PFSA). The PFSA including those administrative activities supportive of, but not included as part of, service delivery programs that are otherwise contractible, without regard to the organizational level within the department that carries out such functions, as authorized under P.L. 93-638, as amended.

G. Tribal Shares. A term that refers to a tribe's equitable share of Area office and Headquarters resources only. This definition was originally adopted and utilized in negotiating and awarding Annual Funding Agreements (AFA) under Title III, P.L. 93-638, as amended, and is being consistently applied to Title 1 contracts as authorized under P.L. 93-638, as amended. This term does not refer to a tribe's equitable share of a service unit or program base, which may also be included in a negotiated funding agreement.

H. Self-Governance Request.

(1) Tribes entering the SGDP (Title III) the first year:

The tribe's application to the IHS for a Negotiation Grant, which is subsequently approved for the tribe's participation in the SGDP. The application must include evidence of having completed a sufficient planning activity as described in the Negotiation Grant application instruction.

(2) Tribes joining an existing compact:

The tribe's written notice to the IHS, which is subsequently approved, that it intends to join an existing compact.

(3) Tribes negotiating for new or expanded programs in a subsequent year's AFA:

The tribe's written notice to the IHS that it intends to negotiate for additional programs.

To be considered a valid request for purposes of establishing placement on the ISD priority list, H1, 2, or 3 above must include a clear description of the programs to be negotiated, date that the program operations are to be assumed, or estimate of the amount of program funding required, and the amount of contract support funding required.

4. PROCESS.

A. Determining Amounts of Start-Up, Direct, and Indirect CSC.

(1) Determining the Amount of the Award. Section 106 (a) (1) and 106 (a) (2) of the P.L. 93-638, as amended, provides for funding of contract and compact awards for program costs and CSC respectively. Section 106(a)(1)

provides the awardee the right to the funding the Secretary would have otherwise provided for the PFSA awarded. In addition, section 106(a)(2) authorizes funding that represents costs associated with tribal expenses or PFSAs either not experienced by the Secretary or provided to the Secretary from resources not available to the awardee.

(2) Providing for Cost Reimbursement. Throughout the operation of the program by the awardee, total contract costs, including CSC, are eligible to be reimbursed as either direct or indirect costs. Since tribes often operate more than one program, many of the costs incurred by the awardee are reimbursed through an indirect cost allocation process, usually negotiated by the cognizant agency. Section 106(a)(3) provides authority for tribes to recover costs in this manner, whether they are indirect in nature (benefiting multiple programs) or additional costs associated with operating a single program.

Since some, but not all, of the funds provided in section 106(a)(2) represent costs that are eligible to be reimbursed through this indirect cost recovery method, the procedures below are intended to ensure that needs are accurately identified but avoid a duplication of funding.

For service unit assumptions, or partial service unit assumptions, the costs historically incurred by the IHS will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the

awardee's indirect cost pool that are similar in nature to the costs incurred by the IHS will be considered as duplicative for purposes of funding for administrative "overhead" purposes (section106 (a) (3) (A) (ii)) In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

a. Start Up Costs. Section 106(a)(5) states, "Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary:

(i) To plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(ii) To ensure compliance with the terms of the contract and prudent management."

Examples include:

- Purchase of computer hardware and software
- Required training and staff development
- Systems development (establishing required administrative and other health management systems)
- Equipment and furniture to support the administrative unit

b. Direct CSC. Requirements for these costs will be determined by negotiation between the awardee and the Secretary. Costs for activities

that are not contained in either the indirect cost pool (or indirect cost type budget) or the amount computed pursuant to section 106(a)(1) can be funded as a direct CSC. These funds shall be awarded on a recurring basis.

Examples include, but are not restricted to:

- Unemployment taxes on direct program salaries
- Workers compensation insurance on direct program salaries
- Cost of retirement for direct program salaries
- Long distance telephone charges
- Postage
- Training required to maintain certification of direct program personnel

Items listed above as examples of startup costs and direct CSC must be justified as such and negotiated with the Area office. Items not included as examples above, but requested and justified by awardees shall be submitted by the Area office to IHS Headquarters, Office of Administration and Management (OAM), for approval. This will contribute to greater consistency from Area-to-Area.

c. Indirect or Indirect Types of Cost. Guide-lines for the Principles Involved in Negotiating Indirect Costs:

A plan for allocation of indirect costs will be required to support the distribution of any indirect costs related to the awardee's program. All indirect costs included in the plan

will be supported by accounting records that will substantiate the propriety of the indirect costs. The allocation plan should cover all indirect costs of the awardee, and contain, but not necessarily be limited to: (1) the nature and extent of services provided and their relevance to the awardee's program; (2) the item of expenses to be included in the indirect cost pool, and (3) the methods to be used in distributing cost.

The Office of Management and Budget (OMB) circulars establish principles and standards for determining indirect costs applicable to the awardee. Public Law 103-413 has made modifications to the OMB cost principles otherwise applicable to tribes and tribal organizations.

(i) Awardee with Negotiated Indirect Cost Rates. The amount of indirect costs expected to be incurred under awards by tribes or tribal organizations with rates that have been negotiated or are being negotiated with the cognizant Federal agency, will be determined by applying the negotiated rate(s) to the direct cost base amount for this purpose. The amount to be reimbursed will be consistent with the individual awardee rate agreement, reflecting any exclusions required by the agreement.

(ii) Awardee without Negotiated Indirect Cost Rates (Guidelines for Agency Negotiators). A lump sum amount for "indirect types of costs" may be computed for awardees who do not have formally negotiated agreements with their cognizant

agency for reimbursement under an indirect cost rate. This annual lump sum amount may be calculated by negotiating a fixed amount for "indirect types of costs" Categories of costs often considered "overhead" or "indirect-type" are generally in the categories of Management and Administration, Facilities and Equipment General Services, and Expenses. Examples of indirect costs are:

Examples of "Overhead" or "Indirect-type" Costs

Management & Administration	Facilities & Equipment	General Services & Expenses
Governing Body	Building	Insurance &
Management & Planning	Utilities	Legal Services
Financial Management	Housekeeping/ Janitorial	Audit
Personnel Management	Building & Grounds	General
Procurement/ Materiel	Repairs & Maintenance	Interest
Human Resources	Equipment	Depreciation/U
Property Management		
Records Management		
Data Processing		
Office Services		

(3) Alternative Methods for Calculating Amount of Section 106 (a)(1) Funds in Area Office and Headquarters "Tribal Shares." With respect to amounts to be considered as the direct program base (for the purpose of calculating indirect or indirect-type costs) from amounts of PFSAs transferred from Areas and Headquarters "Tribal Shares," at the option of the awardee, the IHS and the awardee will either:

a. Conduct a case-by-case detailed analysis of the "purpose for which the funds were utilized by the Secretary" in order to avoid a duplication in amounts funded.

In cases where a detailed analysis is performed, it will be conducted in the following manner:

Area/Headquarters tribal shares will be reviewed to identify types of costs that are similar in nature to those costs that are included in the awardee's indirect cost pool. Those costs that are in the awardee's indirect cost pool that are similar in nature to Area/Headquarters tribal shares will be considered as duplicative for purposes of funding for administrative or "overhead" purposes Section 106 (a) (3) (A) (ii)).

In determining whether such costs are similar in nature, the review will consider both the cost category label (travel, supplies, etc.) and how the funds were spent by the IHS.

b. Apply the following "split" of total Area and Headquarters tribal shares as specified below:

In the absence of a detailed analysis by the awardee and the IHS, 80 percent of Area/ Headquarters tribal shares will be considered as direct program funds (section 106 (a) (3) (A) (I)) and 20 percent of such tribal shares will be considered as funding for administrative or "overhead" purposes (section 106(a) (3) (A) (ii)).

Once an amount is computed for a direct program or an indirect or overhead purpose under method a. or b. above, it will be used in accordance with the terms of the rate agreement or alternative method provided herein, for calculating the amount required

for indirect or indirect type costs. The balance of the tribal shares not considered as direct program expenses (and therefore not used to calculate indirect cost funding requirements) will be considered as available for CSC for the respective awardee. Any such balance, if in excess of the CSC requirement, shall also remain with the awardee. Any excess CSC requirements not funded by the portion of the Area or Headquarters tribal shares to be considered as available for CSC, will be eligible for payment from the ISD fund, and the processes specified in this circular for allocation of funding in this pool will apply.

Exhibit 96-04-B illustrates how the 80/20 method would be calculated, and Exhibit 96-04-C illustrates how a detailed analysis would be calculated.

(4) Allocating Funding Available for CSC. Essentially three pools of funding are contained in the single IHS budget activity for CSC. The first pool represents an increase in the IHS appropriation for CSC for new and expanded awards. The second pool represents amounts awarded in the prior year that are made available to the IHS on a recurring basis. The third pool represents amounts provided for mandatory increases on the prior year "base" and shortfall funds, if appropriated. Each one has funding priorities and eligibility requirements for costs to be reimbursed.

a. Pool No.1- The Indian Self-Determination Fund. The ISD Fund will cover CSC when an award is:

(i) (1) An initial transfer of a program previously operated by the IHS to the tribe or tribal organization; or (2) to expand current tribal operations through the assumption of additional shares of PFSAs previously operated by the IHS, regardless of the organizational level at which it was operated; or (3) assumption of programs previously operated under awards to other tribes, tribal organizations, contractors, and for newly recognized tribes; or (4) new or expanded programs available because of new appropriations, excluding mandatory increases.

(ii) Initial Funding Period-First Come First Served. Funds for new and expanded programs will be allocated by IHS Headquarters as expeditiously as possible. Approved requests for CSC for new and expanded programs will be funded at 100 percent of the approved amount on a first come first served basis. Allocation will be based on a priority list until funding for the ISD funds is exhausted. If permitted by appropriations act, any funds that remain in the ISDF at the end of the year will be added to funds to be made available in the subsequent year. If funds are exhausted in any fiscal year (FY), tribes on the priority list will remain on the priority list and be considered in priority order when funding is made available by appropriation or reprogramming.

Indirect CSC (non-recurring)
Start-up Costs Direct CSC

The ISD fund is the source of funds in the initial funding period.

Program Base
(106 (a) (1) amount)

(iii) Priority Determined by Date of Request. A priority list for each FY will be developed for every tribe with a requested start date in the proposal (Title I) or request (Title III) in that FY. Tribes will be placed on the priority list within the FY based on:

(a) The date of receipt by the IHS Area office of a Title I contract proposal.

(b) The date of receipt by the IHS Area office of a request to negotiate a Title III award.

(iv) Roles and Resposibilities. Tribes will provide either (a) or (b) above to the Area office. The Area office will provide a copy to OAM, and in the case of Title III, an additional copy will be provided to the Office of Tribal Self-Governance (OTSG). In providing either (a) or (b) above, the tribe will include a clear estimate of the amount of CSC required.

The Area office will be responsible for negotiating the CSC and forwarding the recommendation to OAM. In the case of Title III, an additional copy will be forwarded to the OTSG. The Area office shall ensure that costs are reasonable, necessary, and not duplicative.

To the extent that the Area office and the awardee cannot agree on an item(s) of cost, the disputed item(s) shall be submitted to the Director, IHS, through the Headquarters OAM.

(v) Information and Documentation by IHS. The priority list will be maintained by OAM and distributed quarterly to Area offices. The list will include tribe or tribal organization, proposed start date, date of request or proposal, estimated amount of the program costs to be awarded, estimated amount of CSC approved and awarded, and remaining funds available. The OAM will revise estimated amounts of CSCs as additional data becomes available through negotiations.

(vi) Changes in Start Date. While awaiting award of ISD funding, tribes or tribal organizations may choose to delay their starting date, if necessary, because of the delay in the award of contract support funding. Such choice shall not change the placement of the tribe or tribal organization on the priority list. The priority list shall be maintained by OAM and reviewed periodically to ensure the validity of start dates and the amounts needed.

If a tribe changes the FY start date for any reason other than solely the lack of CSC funding, it will be placed in the new FY by its original date.

(vii) Subsequent Funding Periods. Beginning in year 2, direct contract support and section 106(a)(1) funds will be considered part of the recurring base of the award. Mandatory funding increases will be provided based on congressional appropriation. The amount of direct contract support funds may be renegotiated annually at the option of the awardee. The amount of indirect contract support funds must be justified each year based on the awardee's indirect cost agreement or mutually negotiated amounts. Any shortfalls in funding are reported to the Headquarters OAM by Area offices and the OTSG for inclusion in required reports to the Congress, and other reporting to tribes.

Indirect CSC* *(Non-recurring to awardee, recurring to Area)*	**Indirect CSC base amount in subsequent years is described below. Pool No.2 Increases/ decreases to indirect CSC base amount are governed pool No. 3, also described below.*
Direct CSC** *(Recurring to awardee and Area)*	
Program Base** *(Section 106(a)(1) amount) Recurring to awardee and area)*	***Treating as recurring i.e., not adjusted unless tribe request to renegotiate in subsequent years).*

b. Pool No. 2 Prior Year CSC Base (Ongoing Awards). The amount of indirect contract support funds representing the previous year's base will be distributed to Areas as "recurring" to fund each Area's indirect cost need. Each awardee's need for indirect CSC shall be determined by calculating changes, if any, in indirect cost rates, bases,

and pools. If the funds available in the Area's indirect cost base are not adequate to meet all awardee's requirements, then the amount available shall be distributed according to each awardee's proportion of total need, except that prior year funds should not be reduced if justified as described below. These funds will be awarded to the contractor as non-recurring funds.

c. Pool No. 3 Mandatory Increases/ Shortfall Funds. Mandatory increases that represent a percentage of the Area's prior year recurring indirect cost base are distributed annually as available. Additional shortfall funds may also be made available to the IHS and allocated to Area offices for this purpose. Since awardees are required to rejustify their needs for indirect CSC each year, amounts required for indirect CSC may exceed the amount available for this purpose. Mandatories should be allocated in such a manner as to provide increases to awards based on each awardee's proportion of total additional need. If additional need is proportionately greater for some awardee's, they will receive a greater percentage of CSC mandatories and shortfall funds.

Prior year funds provided for indirect CSC to each awardee, if justified in subsequent years, shall not be reduced by the IHS, except as authorized in section 106(b) of the ISDA. Awardee should expect to receive these funds continuously, only if they continue to be justified for at least the

same amount or greater annual need. They are awarded as non-recurring funds to enable the Area to adjust amounts previously awarded if the amount of costs allocated to the IHS for reimbursement should decrease. If amounts previously awarded for indirect CSC are not justified by an awardee in a subsequent year, they will be made available for distribution to other awardees in the Area with unfunded CSC needs for this purpose.

Note: It is not intended for Areas to reduce contract amounts of indirect contract support funds allocated prior to FY 1992 (original date of ISDM No. 92-2, Contract Support Cost Policy was February 27, 1992) as recurring funds without approval of the contractor.

B. Requirements for Reporting and Documenting Amounts of CSC Funds Available, Needed, and Requested. Areas shall maintain an historical record of funds negotiated and awarded in each of the categories:

- Direct program funds
- Start-up costs
- Direct contract support funds
- Indirect cost funding
- Indirect-type cost funding
- Indirect cost rates
- Types of rates
- Types of bases
- Pass through/exclusions

5. SUPERSEDURE. Indian Self-Determination Memorandum No. 92-2, "Contract Support Costs Policy," dated February 27, 1992, and any policies or instructions previously issued regarding the allocation of contract support funds.

6. EFFECTIVE DATE. The policy and procedures contained in this circular are retroactive to April 1, 1996, upon signature by the Director, IHS.

/s/ Michael H. Trujillo, M.D,
MICHAEL H. TRUJILLO, M.D., M.P.H.
Assistant Surgeon General
Director, Indian Health Service

Circular Exhibit 96-04-A
(4/12/96)

Indian Self-Determination and Education and Assistance Act
Public Law 93-638, As Amended

Section 106: [Contract Funding] [25 USC Sec. 450j-1]

[CONTRACT FUNDING]

SEC. 106 [25 USC 450j-l]. (a) (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

(2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—

(A) normally are not carried on by the respective Secretary in his direct operation of the program; or

(B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

(3)(A) The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of—

(i) direct program expenses for the operation of the Federal program that is the subject of the contract, and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106 (a) (1).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall—

(A) be used to provide additional services or benefits under the contract; *OR*

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary—

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

(b) The amount of funds required by subsection (a)—

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years except pursuant to—

(A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;

(B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;

(C) a tribal authorization;

(D) a change in the amount of pass-through funds needed under a contract; or

(E) completion of a contracted project, activity, or program;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated

data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

(5) may, at the request of the tribal organization, be increased by the Secretary if necessary to carry out this Act or as provided in section 105 (c) [450j (c)]. Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

(c) The Secretary shall provide an annual report in writing on or before May 15 of each year to the Congress on the implementation of this Act. Such report shall include—

(1) an accounting of the total amounts of funds provided for each program and budget activity for direct program costs and contract support costs of tribal organizations under self-determination contracts during the previous fiscal year;

(2) an accounting of any deficiency of funds needed to provide required contract support costs to all contractors for the current fiscal year;

(3) the indirect costs rate and type of rate for each tribal organization negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pools; and

(6) an accounting of any deficiency of funds needed to maintain the preexisting level of services to any tribes affected by contracting activities under this Act, and a statement of the amount of funds needed for transitional purposes to enable contractors to convert from a Federal fiscal year accounting cycle to a different accounting cycle, as authorized by section 105(d).

(d)(1) Where a tribal organization's allowable indirect cost recoveries are below the level of indirect costs that the tribal organizations should have received for any given year pursuant to its approved indirect cost rate, and such shortfall is the result of lack of full indirect cost funding by any Federal, State, or other agency, such shortfall in recoveries shall not form the basis for any theoretical over-recovery or other adverse adjustment to any future years' indirect cost rate or amount for such tribal organization, nor shall any agency seek to collect such shortfall from the tribal organization.

(2) Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract.

(e) Indian tribes and tribal organizations shall not be held liable for amounts of indebtedness attributable to theoretical or actual under-recoveries or theoretical over-recoveries of indirect costs, as defined in Office of Management and Budget Circular A-87, incurred for fiscal years prior to fiscal year 1992.

(f) Any right of action or other remedy (other than those relating to a criminal offense) relating to any disallowance of costs shall be barred unless the Secretary has given notice of any such disallowance within three hundred and sixty-five days of receiving any required annual single agency audit report or, for any period covered by law or regulation in force

prior to enactment of Chapter 75 of Title 31, United States Code, or any other required final audit report.

Such notice shall set forth the right of appeal and hearing to the board of contract appeals pursuant to section 110 [450m-1]. For the purpose of determining the 365-day period specified in this paragraph, an audit report shall be deemed to have been received on the date of actual receipt by the Secretary, if, within 60 days after receiving the report, the Secretary does not give notice of a determination by the Secretary to reject the single-agency report as insufficient due to noncompliance with chapter 75 of title 31, United States Code, or noncompliance with any other applicable law. Nothing in this subsection shall be deemed to enlarge the rights of the Secretary with respect to section 16 of the Indian Reorganization Act of June 18, 1934 (25 USC 476, 48 Stat. 984).

(g) Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106 (a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

(h) In calculating the indirect costs associated with a self-determination contract for a construction program, the Secretary shall take into consideration only those costs associated with the administration of the contract and shall not take into consideration those moneys actually passed on by the tribal organization to construction contractors and subcontractors.

(I) On an annual basis, the Secretary shall consult with, and solicit the participation of, Indian tribes and tribal organizations in the development of the budget for the Indian Health Service and the Bureau of Indian Affairs (including participation of Indian tribes and tribal organizations in

formulating annual budget requests that the Secretary submits to the President for submission to Congress pursuant to section 1105 of title 31, United States Code).

(j) Notwithstanding any other provision of law, a tribal organization may use funds provided under a self-determination contract to meet matching or cost participation requirements under other Federal and non-Federal programs.

(k) Without intending any limitation, a tribal organization may, without the approval of the Secretary, expend funds provided under a self-determination contract for the following purposes, to the extent that the expenditure of the funds is supportive of a contracted program:

(1) Depreciation and use allowances not otherwise specifically prohibited by law, including the depreciation of facilities owned by the tribe or tribal organization.

(2) Publication and printing costs.

(3) Building, realty, and facilities costs, including rental costs or mortgage expenses.

(4) Automated data processing and similar equipment or services.

(5) Costs for capital assets and repairs.

(6) Management studies.

(7) Professional services, other than services provided in connection with judicial proceedings by or against the United States.

(8) Insurance and indemnification, including insurance covering the risk of loss of or damage to property used in connection with the contract without regard to the ownership of such property.

(9) Costs incurred to raise funds or contributions from non-Federal sources for the purpose of furthering the goals and objectives of the self-determination contract.

(10) Interest expenses paid on capital expenditures such as buildings, building renovation, or acquisition or fabrication of capital equipment, and interest expenses on loans necessitated due to delays by the Secretary in providing funds under a contract.

(11) Expenses of a governing body of a tribal organization that are attributable to the management or operation of programs under this Act.

(12) Costs associated with the management of pension funds, self-insurance funds, and other funds of the tribal organization that provide for participation by the Federal Government.

(*l*) (1) The Secretary may only suspend, withhold, or delay the payment of funds for a period of 30 days beginning on the date the Secretary makes a determination under this paragraph to a tribal organization under a self-determination contract, if the Secretary determines that the tribal organization has failed to substantially carry out the contract without good cause. In any such case, the Secretary shall provide the tribal organization with reasonable advance written notice, technical assistance (subject to available resources) to assist the tribal organization, a hearing on the record not later than 10 days after the date of such determination or such later date as the tribal organization shall approve, and promptly release any funds withheld upon subsequent compliance.

(2) With respect to any hearing or appeal conducted pursuant to this subsection, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds.

(m) The program income earned by a tribal organization in the course of carrying out a self-determination contract—

(1) shall be used by the tribal organization to further the general purposes of the contract; and

(2) shall not be a basis for reducing the amount of funds otherwise obligated to the contract.

(n) To the extent that programs, functions, services, or activities carried out by tribal organizations pursuant to contracts entered into under this Act reduce the administrative or other responsibilities of the Secretary with respect to the operation of Indian programs and result in savings that have not otherwise been included in the amount of contract funds determined under subsection (a), the Secretary shall make such savings available for the provision of additional services to program beneficiaries, either directly or through contractors, in a manner equitable to both direct and contracted programs.

(o) Notwithstanding any other provision of law (including any regulation), a tribal organization that carries out a self-determination contract may, with respect to allocations within the approved budget of the contract, rebudget to meet contract requirements, if such rebudgeting would not have an adverse effect on the performance of the contract.

Circular Exhibit 96-04-B
(4/12/96)

Contract Support Costs Calculated Using the 80/20 Method

Assumptions:

1. Tribe A has $100,000 in Area and Headquarters Tribal Shares
2. Indirect cost rate = 30%
3. New budgeted tribal wages = $48,000
4. Direct Contract Support = 15% of wages
5. No excluded items
6. Other Direct Contract Support Costs = $5,000

Expanded program base $100,000 tribal shares x 80%	$80,000
DCSC fringe $48,000 wages x 15%	$7,200
Other DCSC	$5,000
Sub-total direct	$92,200
Less excluded items	$0
Total direct	$92,200
x 30% indirect cost rate	$27,660
TOTAL Direct and Indirect	$119,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$27,660
TOTAL CSC	$39,860
Less tribal shares available for CSC	$(20,000)
TOTAL ISD Request	$19,860

Tribe A would receive $100,000 from tribal shares and $19,860 would be requested from the ISD fund.

Circular Exhibit 96-04-C
(4/12/96)

Contract Support Costs Calculation Based on a Detailed Analysis

Assumptions:

1. Tribe B has $100,000 in Area and Headquarters tribal shares
2. Detailed analysis indicates that $10,000 of tribal shares are similar in nature to costs included in tribe B's indirect cost pool
3. Indirect cost rate = 30%
4. New budgeted tribal wages = $48,000
5. Direct contract support fringe = 15% of new wages
6. Other direct contract support = $5,000
7. No excluded items

Expanded program base $100,000-$10,000	$90,000
DCSC Fringe $48, 000 x 15%	$7,200
Other DSCS	$5,000
Sub-total direct	$102,200
Less excluded items	$0
Total direct base	$102,200
x 30% indirect cost rate	$30,660
TOTAL Direct and Indirect	$132,860

ISD Calculation

DCSC recurring	$12,200
ICSC non-recurring	$30,660
TOTAL CSC	$42,860
Less tribal shares available for CSC	$(10,000)
TOTAL ISD Request	$32,860

Tribe B would receive $100,000 from tribal shares and $32,860 would be requested from the ISD fund.

Date: September 24, 1997

To: Director

From: Director of Headquarters Operations

Subject: 1997 Report to Congress on Funding of Self-Determination Awards, and Contract Support Cost Shortfall

I am transmitting the above subject Report to Congress for your approval. The Report is submitted in response to Section 106(c) of P.L. 93-638. It communicates to the Congress that IHS has obligated $688 million in FY 1996 for program costs of Self-Determination contracts and Self-Governance compacts. Additionally, IHS has obligated $153 million in FY 1996 for Contract Support Costs (CSC) of all awards under P.L. 93-638, and has identified a shortfall in funding of CSC for FY 1997 of $82 million. The preparation of this Report has been coordinated with each IHS Area Office, the Office of Tribal Self-Governance, the Office of Tribal Programs and the Office of Management Support/ Division of Financial Management. I recommend that you approve this Report.

/s/ Luana Reyes
LUANA REYES
Director of Headquarters Operations

Prepared by: /s/ Athena S. Windy Boy
- ATHENA S. WINDY BOY, Director, MPSS

Approved by: /s/ Carl Fitzpatrick
CARL FITZPATRICK, Director, DFM

/s/ Merry Elrod
for DOUGLAS BLACK, Director, OTP

/s/ [illegible]
for PAULA WILLIAMS, Director, OTSG

Concurrence: /s/ Robert G. McSwain
Robert G. McSwain, Director, OMS

Report to Congress on Funding Requirements
for Contract Support Costs
of Self-Determination Awards

In Response to:
Section 106c of P.L. 93-638, as amended.

Fiscal Year 1997

Prepared by the
Indian Health Service
Department of Health and Human Services

/s/ [illegible]
Director, Indian Health Service

Report to Congress on Funding Requirements
for Contract Support Costs
of Self-Determination Awards

Introduction

This report is provided in response to Section 1060 of P.L. 93-638, as amended (hereafter referred to as the "Act"). The Act requires an annual accounting of funds provided for direct program costs and contract support costs of tribal organizations under self-determination contracts. We have also included in this report, amounts of direct program costs and contract support costs of self-governments compacts awarded under Title III of the Act. Both contracts and compacts are equally eligible for contract support costs. The information presented includes amounts for both types of awards made under the Act. They will both be referred to throughout this report as "awards."

Background

The Act authorizes the Secretary to fund costs of awards in addition to what the Secretary would have otherwise provided

for the direct operation of the program. These costs are referred to as contract support costs (CSC). Amounts of CSC funding are for activities either not carried out by the Secretary, or are carried out by the Secretary from resources other than those under contract. Since 1994, funding for new and expanded awards has been increasingly inadequate.

The Indian Health Service (IHS) has worked extensively with the active participation of tribal representatives to develop policies and procedures in this area. The first Agency policy was approved in February 1992. It has been recently modified to include self-governance compacts as eligible for CSC, and details procedures for calculating CSC requirements when a tribe is assuming operation of their tribal share of Area Offices and Headquarters. The most recent IHS policy on CSC was approved by the Director in April 1996, and is IHS Circular 96-04 (See Attachment 1). This purpose of this policy is to provide instructional guidance on 1) determining amounts of required CSC; 2) Allocating pools of IHS funding available for CSC; 3) prioritizing tribal requests for CSC; and 4) reporting by the IHS to all tribes and to the Congress.

Status of Current Year Requirements

Currently an $82 million shortfall exists in funding requirements for contract support costs. The major component of the Fiscal Year (FY) 1997 shortfall consists of requests for first year contract support funding for new awards. This component of the total shortfall is currently in excess of $49 million, and is continuing to grow. Historically, lack of adequate CSC funding has been an impediment to contracting under the Act. However, virtually all of the tribes on this waiting list for first year funding have chosen to begin operations without adequate CSC funding.

When a tribe begins operations without adequate CSC, an immediate shortfall is created. Tribes with indirect cost rate

agreements may show an "underrecovery" of CSC for the first year of operation in these cases, the indirect cost rate for the next year would be increased to allow for adequate cost recovery by the tribe. Therefore, current year shortfalls in CSC funds serve to inflate CSC requirements in subsequent years.

Linkage with other Reports to Congress on CSC

Much interest has been expressed by the Congress in the increasing requirements for CSC. Shortfalls are increasing annually. A study was recently conducted by the IHS, with the participation of tribal representatives, the Department of Interior, Bureau of Indian Affairs, and the Office Of the Inspector General, in response to House Report No. 104-173 regarding CSC escalation. This report was submitted to the Congress in May 1997 (See Attachment 2). Much of the information provided in the May 1997 report is similar in nature to the information requested in Section 1060 of the Act.

Total Funding Provided for Direct Program Cost and Contract Support Cost for Self-Determination Awards During FY 1996.

Total FY 1996 program funds awarded to tribes and tribal organizations for self-determination contracts and self-governance compacts:	$688,000,000
Total FY 1996 funds for contract support costs awarded to tribes and tribal organizations for self-determination contracts and self-governance compacts:	$153,026,000

An Accounting of any Deficiency of Funds Needed to Provide Required Contract Support Cost to all Awardees for FY 1997.

Current shortfall from new and expanded awards:	$49,137,000
Current shortfall from increased costs of ongoing awards:	$32,819,000
Total CSC shortfall for FY 1997:	$81,956,000

Details of Indirect Cost Rates, Types of Rates, Direct Cost Bases, Types of Bases, Indirect Cost Pools and Types of Cost Included in the Pools, for each Tribal Organization Negotiated with the Appropriate Secretary.

This information is provided in Attachment 3 to this report.

Exhibit 16

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA; AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

STATE OF NEVADA)
) ss.
COUNTY, OF ELKO)

AFFIDAVIT OF WINONA L. MANNING

I, WINONA L. MANNING, being first duly sworn, depose and state as follows:

1. I am Finance Director of the Shoshone-Paiute Tribes of the Duck Valley Reservation (Tribes), a position I have held since November 3, 1980.

2. In my capacity as Finance Director, I have extensive personal knowledge of and responsibility for the various agreements entered into between the Tribes and the Indian Health Service (IHS) described in this affidavit, and was personally involved in negotiating each of them. Among

other things, I am familiar with the amount of funding agreed to and provided under those agreements and associated agreements. In addition, I have detailed first-hand knowledge of the various IHS programs operated under those agreements and the administration of those programs by the Tribes during fiscal years 1981 through the present. As Finance Director, I am also familiar with the organization and operation of the Tribal government.

3. I am also very familiar with the history of the Tribes and the IHS health programs serving them. I directed the research and writing of four books for the Inter-Tribal Council of Nevada on the history of the four Indian tribes in Nevada, all published by the University of Utah Press. They are *Numa: A Northern Paiute History* (1976); *Newe: A Western Shoshone History* (1976); *Nuwivi: A Southern Paiute History* (1976); and *Wa She Shu: A Washo History* (1976).

4. The Tribes have an enrolled population of approximately 1,800 members, about 1,500 of whom live on or very near the Duck Valley Reservation. The reservation includes about 290,000 acres in the remote and lightly inhabited high desert of southern Idaho and northern Nevada. The center of the reservation is a broad valley that covers an area of about 10 miles by 25 miles. Irrigated by the Owyhee River and associated canals, the valley provides land for agriculture, particularly growing feed for cattle. Other portions of the high plateau lands and mountains surrounding the valley are used for seasonal grazing. Tribal headquarters and the Tribes' health facility are located in Owyhee, Nevada, adjacent to the Idaho border in the center of the reservation. The nearest cities to Owyhee are Mountain Home, Idaho, located approximately 97 miles to the north, and Elko, Nevada, located about 94 miles to the south. The closest major city is Boise, Idaho, located about 143 miles north of the reservation. The nearest other health facilities are in Mountain Home and Elko, nearly 100 miles away from the Tribes' health facility.

A map accurately depicting this area and the distance to other health facilities accompanies Plaintiffs' Motion as Exhibit 33.

5. The reservation was established by executive order in 1877 at the request of a western Shoshone leader and initially occupied by bands of western Shoshone as a permanent place to live and pursue farming and ranching. Previously, these bands had ranged throughout what is now Nevada, Oregon, Northern California, Idaho, and Utah. Additional lands were added to the reservation in 1886 and 1910 to accommodate more bands of western Shoshone and Northern Paiute that came to settle there or that were forcibly located there by the federal government.

6. The Tribes have adopted a constitution under section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The governing body of the Tribes is the Business Council, made up of a Chairman and six members who are elected by the tribal membership to staggered, three-year terms. The Business Council has the power to pass tribal laws and ordinances, regulate tribal businesses and appropriate funds for use by the executive departments. It also directs tribal activity through an administrative staff headed by a Tribal Health Administrator, a Tribal Programs Administrator, and a Support Services Administrator.

7. The Tribes currently employ about 225 full-time or full-time-equivalent employees, including 95 positions in the health program.. (This includes individuals who are federal employees assigned to the Tribes pursuant to Intergovernmental Personnel Act Agreements or Memoranda of Agreement.) Other employers on the reservation include a public school for the reservation and surrounding areas, construction, firefighting, recreation, law enforcement, private businesses such as a motel and a gas station, and the many local ranching and farming operations.

8. The first full-time physician was assigned to the reservation in 1882. In 1916, work began to convert a school to a five-bed hospital. A second, 12-bed hospital was built in 1936 and used until 1976, when the IHS built the 15-bed Owhyee Community Health Facility (hospital) now in use.

9. In 1988, I was present at a meeting with IHS when it announced plans to terminate inpatient care at the hospital within one year. The Tribes responded by beginning to study ways to maintain and improve the health services on the. reservation, and by obtaining a five-year congressional moratorium on the proposed termination of inpatient services at the hospital. As part of these efforts, the Tribes commissioned a detailed "Full Utilization Study" of the hospital to identify the needs for health services on the reservation and the ways that those needs could be met within the applicable administrative and funding constraints. Based on this study and other information, the leadership of the Tribes concluded that inpatient services at the hospital were an important part of health care on the reservation and could be provided efficiently under proper administration. In addition, the leadership of the Tribes concluded that substantial improvements in the health care system on the reservation could also be implemented by making changes in the hospital's operation with regard to outpatient and community health services, as well as inpatient services.

10. In 1994, faced with losing inpatient care at the hospital, the Tribes chose to enter into a Compact of Self-Governance with the United States to take over the hospital and preserve its full range of services. (A true and correct copy of the Tribe's original compact accompanies Plaintiffs' Motion as Exhibit 19.) Tribal members supported this decision by voting affirmatively on a referendum regarding the issue.

11. As a first step in this process, the Tribes at the beginning of fiscal year 1995 expanded an existing (1991) self-determination contract with the IHS under Title I of the Indian Self-Determination and Education Assistance Act (ISDEA) to include additional portions of the IHS community health program. (A true and correct copy of the original contract accompanies Plaintiffs' Motion as Exhibit 18, and a true and correct copy of "Modification 16" to the contract, which added the community health programs, accompanies the Motion as Exhibit 20). The Tribes then transferred this program on January 1, 1995 to an Annual Funding Agreement (AFA). (A true and correct copy of the FY 1995 AFA, as amended, accompanies the Plaintiffs' Motion as Exhibit 21.) At the beginning of fiscal year 1996, the Tribes again expanded the AFA to cover the rest of the IHS programs provided on the reservation, including inpatient hospital services, and the Compact was amended. (True and correct copies of the FY 1996 AFA and of the Compact, as amended October 1, 1995, accompany Plaintiffs' Motion as Exhibits 22 and 23.)

12. The Tribes made the decision to take over all the IHS programs on the reservation under their Compact in fiscal year 1996 with the understanding that doing so would be a large and costly undertaking for the Tribes' administration. Prior to assuming operation, the Tribes' total revenues and expenditures were $3,685,080, while according to IHS, its budget for direct services at the hospital (not including contract support costs) was more than $5 million. To make sure that the Tribes could properly administer the new programs, we made sure to negotiate contract support costs, both for the start-up expenses and for ongoing expenses. (A true and correct copy of the Tribes' Contract Support Cost Budget, August 7, 1995, accompanies Plaintiffs' Motion as Exhibit 24, and a true and correct copy of the Tribes' FY 1996 IDC Negotiation Agreement accompanies Plaintiffs' Motion as Exhibit 25. In March 1996, the FY 1996 AFA was

amended to reflect the Tribes' agreement with IHS regarding contract support costs. (A true and correct copy of Amendment No. 1 to the FY 1996 AFA accompanies Plaintiffs' motion as Exhibit 26.)

13. The Tribes planned to use the start-up, or non-recurring costs, to hire additional staff and install a new accounting system capable of handling the expansion. In addition, the Tribes recognized that the transition would require extensive training of the staff and tribal leadership as well as the use of outside specialists and consultants.

14. Despite these agreements and plans, the IHS did not provide any contract support funds to cover the expense of taking over and administering the new programs. Instead, IHS officials informed the Tribes that Congress had not appropriated enough money to pay contract support costs to the Tribes and that the Tribes had been put on a list ranked according to the date of their request to take over the programs. The IHS told the Tribes that it could only fund the tribes that were at the top of the list, and would not fund the Tribes until they rose high enough on the list. At the time, the IHS stated that the Tribes would rise high enough on the list to receive at least some funding—perhaps fifty percent—in the next year, fiscal year 1997.

15. Based on this information and the threat that the IHS would close the hospital entirely and shift many services away from the reservation, the Tribes made a decision to go ahead with the programs. We entered into a new AFA with IHS for FY 1997 and negotiated a new FY 1997 Indirect Cost Agreement. (True and correct copies of the Tribes' 1997 AFA and FY 1997 Indirect Cost Negotiation Agreement accompany Plaintiffs' Motion as Exhibits 27 and 28.) Two months into fiscal year 1997, however, the IHS informed the Tribes that they would not receive any contract support funding until fiscal year 1998. Finally, the Tribes received funding in fiscal

year 1998. However, the impact of the two years without funding is still being felt in the health services on the reservation.

16. In particular, the lack of funding contributed to the Tribes' inability to fill 27 of the 66 vacant positions in the health programs when we assumed operation of the hospital, including three key administrative positions, a substance abuse program specialist, a clinical psychologist, a mental health technician, a community health nurse, a public health educator, two cooks, a medical social worker, a quality assurance officer, two physicians (out of three), a physician's assistant, an accounting technician, three supervisory clinical nurses, six clinical nurses, a pharmacist, and a maintenance mechanic. (Since receiving funding in fiscal year 1998, the Tribes have filled most of these positions.)

17. Further, during 1996 and 1997, the Tribes did not have the funds to remedy significant deficiencies in the hospital that had developed during the IHS's administration of the facility. At the time IHS turned the facility over to the Tribes, a "Deep Look Survey" by the IHS Phoenix Area office identified 19 items that needed immediate correction to meet the accreditation requirement of the Fire and Life Safety Codes, and seven items that needed correction to maintain a safe environment for patients, staff, and visitors not covered under those codes. The cost of repairing these deficiencies was determined to be $140,504 and $1,481,415 respectively. A member of my staff prepared a chart of the deficiencies identified in the Deep Look Survey for business purposes only and not for purposes of this litigation. A true and correct copy of the chart is attached to the Motion for Summary Judgment as Exhibit 29. In addition, the hospital quarters fell into further disrepair as facilities staff was limited to performing only urgently needed work. The Tribes were only able to begin to address these problems when they received full funding in fiscal year 1998.

18. Due to the lack of funding for administration of the hospital, the Tribes were unable to develop and implement many of the personnel, purchasing, billing, training, monitoring, computer, and systems necessary for efficient management.

19. Other adverse impacts of IHS's failure to provide the contracted-for funds are described in the accompanying affidavit of Tribal Health Administrator Walden Townsend (Exhibit 17).

20. Before initiating this lawsuit, the Tribes attempted to recover the contract support costs promised but not paid by the IHS, by filing claims for them under the Contract Disputes Act. As Finance Director, I was directly involved in preparing these claims. (True and correct copies of the certified claim letters, without their exhibits, accompany Plaintiffs' Motion as Exhibits 34 and 35.) Unfortunately, IHS did not issue a decision on either claim within the statutory deadline, effectively denying them, and it has been necessary for the Tribes to file this action to recover the amounts due.

DATED this 20th day of July, 1999.

/s/ Winona L. Manning
WINONA L. MANNING

SUBSCRIBED AND SWORN TO before me this 20th day of July, 1999.

/s/ Helen L. Hernandez
HELEN L. HERNANDEZ
Notary Public in and for the State of Idaho
My Commission Expires: 09-04-2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S CIV

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

STATE OF NEVADA)
) ss.
COUNTY OF ELKO)

AFFIDAVIT OF WALDEN TOWNSEND

I, Walden Townsend, being first duly sworn, depose and state as follows:

1. I am the Owyhee Community Health Facility Tribal Health Administrator for the Shoshone-Paiute Tribes of the Duck Valley Reservation, and have held that position since January 12, 1998. I am a tribal member, and have been employed by the Tribes in various positions since June 17, 1991.

2. As Tribal Health Administrator, I have detailed personal knowledge of the Tribes' operation, since January 1998, of the various IHS programs operated under the Tribes' Compact of Self-Governance with the United States.

3. The Tribes currently deliver an array of health services to a Service Unit Area population of about 4,000 people located on the reservation, in a long-term BIA detention center located on the reservation, and in surrounding communities and ranches. These programs include inpatient services, medical and behavioral clinical services, preventive health services, dental services, emergency services, laboratory services, pharmacy services, dietary services, and "contract health" services, which are services provided through contracts with private sector health care providers. In addition, the Tribes provide support services, including medical records services, property and supply services, housekeeping, facilities management, and general hospital administration.

4. These health programs are administered through the Business Council, which appoints the Tribal Health Administrator. The Tribal Health Administrator is responsible for making policy and operating decisions through the authority of the Hospital Governing Body. A Board of Health and Human Services, made up of representatives of the service population, including non-IHS beneficiaries, performs an advisory function.

5. The hospital provides inpatient services 24 hours a day, seven days a week, and averages 10 to 15 discharges per month and about 30 to 40 inpatient days per month. Common diagnoses include cardiac-related illnesses, such as congestive heart failure, pneumonia, and alcohol dependence. In addition, the inpatient unit provides some long-term care and monitoring of emergency obstetrical services. (Most deliveries are referred to the hospital at Mountain Home Air Force Base, Idaho.) The inpatient unit is staffed by the

facility's three physicians and 11 nurses depending on need. (Generally, the same staff serves inpatients and outpatients.)

6. The outpatient clinic offers service during normal business hours, and averages about 1,000 visits per month. Common diagnoses include diabetes, hypertensive disease, rheumatology and allergies, along with a range of general medical evaluations and procedures. Staffing consists of three physicians, one physician's assistant, 11 nurses, and four nurse aides.

7. The behavioral clinic offers services during normal business hours and after hours through an on-call schedule, and averages about 200 visits per month. The clinic provides individual and group counseling and alcohol and drug treatment (not involving detoxication). The clinic also provides social work services, integrated throughout with the services provided at the hospital. Common diagnoses include depression, substance abuse, domestic violence, child abuse, and juvenile delinquency. This unit is staffed by a clinical psychologist, a medical social worker, mental health technician, two alcohol and drug abuse counselors, and four employees providing social services. The Tribes contract with a psychiatrist to supplement the Hospital's mental health services.

8. Preventive Health Services primarily involves field visits and education. It is currently staffed by a home health nurse, two community health representatives, and one home health aide. The unit averages 50 visits per month to home-bound patients and those needing transportation, monitoring, post-operative care, and other types of care. The Tribes are also seeking to hire a public health nurse.

9. The dental clinic has two chairs and averages about 200 visits a month. It is staffed by one dentist and two dental assistants. Treatment provided includes prophylaxis, restoration, extraction, non-surgical periodontics, crowns,

dentures and minor tooth movement. Although the incidence of cavities and other dental problems is much higher on the reservation than among the general population, the facility only has the capacity to provide limited routine care for adults.

10. The Tribes are the only provider of medical services within a nearly-100-mile radius, including a considerable length of public highway and many isolated ranches. As such, the Tribes provide emergency services at all times, with physician and other staffing provided through call back. On average, the facility receives about 80 emergency visits per month. The Tribes employ the equivalent of about five full-time emergency medical technicians and maintain three emergency vehicles. After patients are stabilized, they are generally transported to other facilities.

11. Radiology services offers conventional radiological exams at all times through a radiologic technologist and two medical technologists (who also provide lab services), with a rotating on-call schedule. The unit averages about 40 patients per month.

12. Laboratory services are provided by a staff of two medical technologists, who perform 25,000 to 50,000 individual tests per year. Testing is also performed through contract services as necessary. Testing is available at all times through an on-call schedule.

13. The pharmacy averages 1,000 visits per month. The pharmacy is staffed by a pharmacist and two assistants.

14. Dietary services includes meals to inpatients and about 40 outpatient diabetic patients. It is staffed by two full-time cooks, an intermittent cook and a contract dietician.

15. The Tribes also provide senior services under the health program (approximately one-half of this program is funded through IHS). This program, by providing assistance

with chores services and about 60 meals a day, allows older residents to stay at home with their families rather than go away to live in nursing homes in distant communities. The senior program is staffed by a director, cook, four chore workers, a janitor, a driver and kitchen helpers.

16. The contract health services program is administered under the Managed Care unit. It administers payment for services provided by other providers and facilities, including the transfer of emergency medical services not available at the hospital. In accomplishing this task, the program negotiates contracts with providers to limit costs. Contract facilities include hospitals in Battle Mountain, Ely, and Elko, Nevada; Salt Lake City, Utah; Boise and Mountain Home Air Force Base, Idaho; and the Phoenix Indian Medical Center in Phoenix, Arizona.

17. In addition to contract health services, the Managed Care unit provides billing, collection and accounting services for all services rendered at the Owyhee hospital. This includes billing private insurance where available, as well as Medicare and Medicaid for eligible patients. Staffing for the unit includes seven full-time employees.

18. Medical information services, which includes managing patient records, healthcare databases, and security systems under a host of legal and internal requirements, is provided by five employees, including a medical records administration specialist, two medical records technicians, and two medical records clerks.

19. The medical services provided by the Tribes' health program are supported by property acquisition services (two full-time employees), housekeeping services (six employees), and facilities management services (five full-time employees).

20. Four full-time administrators and two secretaries provide the health program with the technical and advisory

support needed to meet procedural, legal and administrative requirements. These administrator's duties include recruitment and staffing, classification and pay administration, employee and labor relations, and general management, training and development of employees.

21. These health programs have been adversely impacted by the funding shortfall resulting from the IHS s failure to pay contract support costs in FY 1996 and FY 1997. For example, with respect to contact health services (that is, services that the Tribes are unable to provide and so must refer to other providers), the funding shortfall required the Tribes to provide only for "Level I Medical Priority Care." Level I includes only "Emergent/Acutely Urgent Care Services" such as emergency room care, emergency psychiatric care involving suicidal persons, and services and procedures necessary for the evaluation of potentially life threatening illnesses or conditions.

22. The lack of funding has also prevented the Tribes from replacing many items as scheduled, so that they are being kept in service past their replacement date. Most significantly, these included 35 medical items. The most expensive item is the hospital's 18-year-old x-ray machine, which would cost more than $200,000 to replace on the open market. In addition, the Tribes have been unable to establish reserves to prepare for the replacement of major items in the future.

DATED this 20 day of July, 1999

/s/ Walden Townsend
WALDEN TOWNSEND

SUSCRIBED AND SWORN TO before me this 20th day of July, 1999.

[NOTARY SEAL]

/s/ Helen Hernandez
HELEN HERNANDEZ
Notary Public in and for the State of Idaho
My Commission Expires: 09-04-2004

COMPACT OF SELF-GOVERNANCE
between the
DUCK VALLEY SHOSHONE PAIUTE TRIBES
and the
UNITED STATES OF AMERICA
October 1, 1994,
as amended October 1, 1995

SHOSHONE PAIUTE TRIBAL HEALTH COMPACT

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TRIBAL HEALTH COMPACT
Between The
DUCK VALLEY SHOSHONE PAIUTE TRIBES
and the
UNITED STATES OF AMERICA
October 1, 1994,
as amended October 1, 1995

This Compact of Self-Governance, under Title III of Public Law No. 93-638, as amended, is made and entered into by and between the Secretary of Health and Human Services, of the United States of America, represented by the Director of the Indian Health Service, and the Shoshone Paiute Tribes of the Duck Valley Reservation. This Compact is entered into under the Self-Governance Demonstration Project which authorizes the Secretary to enter into Compacts and Annual Funding Agreements with the governing bodies of participating Tribal governments. The Secretary has delegated the authority to enter into this compact and the related annual funding agreement to the Director, Indian Health Service (IHS).

WITNESSETH:

WHEREAS, the Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, American Indian Tribes and American Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the federal domination of programs for, and services to, American Indian Tribes and individual Indians to effective and

meaningful participation by the Tribes and Indian people in the planning, conduct, and administration of those programs and services, 25 U.S.C. § 450a(b);

WHEREAS, the Congress has declared its commitment to supporting and assisting American Indian Tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities, 25 U.S.C. § 450a(b);

WHEREAS, Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian Tribes and Indian people, 25 U.S.C. § 1601(a);

WHEREAS, the Congress has declared that it is the policy of the United States, in fulfillment of its special responsibilities and legal obligations to American Indian Tribes and Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy, 25 U.S.C. § 1602(a);

WHEREAS, in furtherance of the federal policy of tribal self-determination, Congress has directed the Secretary of Health and Human Services (hereinafter the "Secretary") to conduct a demonstration project known as the Tribal Self-Governance Project under Title III of the Indian Self-Determination and Education Assistance Act, P.L. 100-472, as amended, (hereinafter "Title III");

WHEREAS, Congress, in Title III, has authorized the Secretary to negotiate and implement a Compact of Self-Governance and Annual Funding Agreements with the governing bodies of participating Tribal governments of qualified American Indian Tribes;

WHEREAS, Congress has directed that the Annual Funding Agreements, which the Secretary negotiates with Tribes, shall authorize the Tribes to plan, conduct, consolidate, administer, redesign, and reallocate funds for programs, services and functions of the Indian Health Service as specified in § 303(a) of Title III;

WHEREAS, each Annual Funding Agreement shall specify the services to be provided, the functions to be performed, and the responsibilities of the Tribe and the Secretary pursuant to the Agreement, § 303(a)(4) of Title III;

WHEREAS, the Annual Funding Agreement shall specify the authority of the Tribe and the Secretary, and the procedures to be used, to reallocate funds or modify budget allocations within any project year, § 303(a)(5) of Title III;

WHEREAS, for the year for which, and to the extent to which, funding is provided to a compacting Tribe, pursuant to an Annual Funding Agreement, the Tribe shall be responsible for administration of programs, services and activities pursuant to the Agreement, consistent with § 303(b)(2) of Title III;

WHEREAS, nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the services, contracts or funds that any other Indian Tribe or tribal organization is eligible to receive under § 102, [25 U.S.C. § 450f], or any other applicable Federal law, § 306 of Title III;

WHEREAS, Congress has, in Title III, directed that the Annual Funding Agreements, which the Secretary negotiates with Indian Tribes shall contain certain provisions and, at the option of the Tribes, apply to certain programs, activities, functions and services of the Indian Health Service (including certain construction) as specified in § 303(a) of Title III;

WHEREAS, Congress has directed that, at the request of the governing body of qualifying Tribes and under the terms

of an Annual Funding Agreement, the Secretary shall provide funding to the Tribes to implement the Annual Funding Agreement, § 303(c) of Title III;

WHEREAS, Congress has directed that, to the extent feasible, the Secretary shall interpret federal laws and regulations in a manner that will facilitate a Compact of Self-Governance and Annual Funding Agreement authorized by § 303(e) of Title III;

WHEREAS, Congress has directed that, to the extent feasible, the Secretary shall interpret federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by § 303(f) of Title III;

WHEREAS, the parties have determined that all of the provisions of this Compact are authorized by Title III or other provisions of federal law and the parties have executed this Compact in reliance on this representation;

Now, THEREFORE, the Secretary and the Shoshone Paiute Tribes do hereby agree to enter into, undertake, and be bound by this Compact in accordance with the foregoing principles.

ARTICLE I—AUTHORITY AND PURPOSE

Section 1—Authority. This Compact of Self-Governance (hereinafter referred to as the "Compact"), is authorized by Title III of the Indian Self-Determination and Education Assistance Act, hereby entered into by the Secretary of the Department of Health and Human Services of the United States of America (hereinafter referred to as the "Secretary"), represented by the Director of the Indian Health Service, and the Shoshone Paiute Tribes. The Director of the Indian Health Service by signing this Compact commits the Secretary to the extent and within the scope of the Secretary's delegation of authority to enter into an Annual Funding Agreement pursuant to Title III or as otherwise authorized.

Section 2—Purpose. This Compact shall be liberally construed to achieve its purposes:

(a) This Compact is to carry out an unprecedented Self-Governance Demonstration Project, which is intended as a demonstration in the areas of health planning, funding and program operations within the government-to-government relationship between the Tribes and the United States. The Demonstration Project encourages innovation in order to determine how to improve this government-to-government relationship and promote the autonomy of the Tribes in the realm of health care.

(b) This Compact is to enable the Tribes to re-design health programs, activities, functions, and services of the Indian Health Service; to reallocate funds for such programs, activities, functions, or services according to the priorities of the Tribes; to provide such reallocated funds for such programs, activities, functions, or services according to its priorities; to provide such programs, activities, functions, and services, as determined by such priorities; to enhance the effectiveness and long-term financial stability of the Tribes; and to streamline the federal Indian Health Service bureaucracy.

(c) This Compact is to enable the United States to maintain and improve its unique and continuing relationship with and responsibility to the Tribes through the establishment of a meaningful demonstration project for tribal self governance and to permit an orderly transition from federal domination of programs and services. This Compact and Annual Funding Agreement shall transfer to the Tribes the responsibility for the programs, activities, functions and services of the Indian Health Service included in the Annual Funding Agreement. This Compact allows the Tribes to exercise authority to plan, conduct, and administer those programs and services to meet the health care needs of the Tribes. In fulfilling its responsibilities under the Compact and consistent

with the April 29, 1994, Memorandum from the President of the United States of America for the Heads of Executive Departments and Agencies, attached hereto as Exhibit B, the Secretary hereby pledges that the Indian Health Service will conduct all relations with the Tribes on a government- to-government basis.

Section 3—Tribal Law and Forums. The duly enacted laws of the Tribes shall be applied in the execution of this Compact and the powers and decisions of the Tribes' Court shall be respected to the extent that federal law, construed in accordance with the applicable canons of construction and Title III of the Indian Self-Determination Act, as amended, is not inconsistent. This shall not be construed as a waiver of federal sovereign immunity, or that of the Tribes', but shall govern disputes between tribal members, or other persons, and the Tribes regarding programs, services, functions and activities under the Compact and related Annual Funding Agreement.

ARTICLE II—TERMS, PROVISIONS AND CONDITIONS

Section 1—Term and Resolutions.

(a) Term. The term of this Compact begins on the effective date of the Tribes' first Annual Funding Agreement for Fiscal Year 1995, and shall extend thereafter as to the Tribes throughout the period authorized by Title III of the Indian Self-Determination and Education Assistance Act, and any subsequent amendment thereto, provided the Tribes have an Annual Funding Agreement in effect, and shall be subject to renewal as may be provided by law and approved by the Tribes.

(b) Resolution. The Tribes shall enter into a resolution authorizing the Chairman, on behalf of the Tribes, to enter into this Compact and Annual Funding Agreement.

Section 2—Effective Date.

(a) Once this Compact and the Annual Funding Agreement, attached hereto as Exhibit C, are approved and signed by the Tribes and the Secretary, they shall be forthwith submitted by the Secretary to the Committee on Indian Affairs of the United States Senate, and the Committee on Natural Resources of the United States House of Representatives, and shall be effective ninety days after such submission, unless otherwise provided by law.

(b) All successor Annual Funding Agreements shall be subject to, and all the activities thereunder shall be governed by, the terms of this Compact to the same extent as the initial Annual Funding Agreement Successor Annual Funding Agreements shall be submitted in the same manner in subsequent years while the Compact remains in effect.

(c) Each Annual Funding Agreement and successor Annual Funding Agreement is deemed to be incorporated, as negotiated, by reference into this Compact. In the event of inconsistency between the Compact and any successor Annual Funding Agreement, the provisions of the Compact shall prevail.

Section 3—Funding Amount. Subject only to the appropriation of funds by the Congress of the United States and to adjustments pursuant to § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide the total amounts specified in the Annual Funding Agreement.

Section 4—Payment.

(a) Payment Schedule. Payment shall be made as expeditiously as possible and shall include financial arrangements to cover funding during periods under continuing resolutions to the extent permitted by such resolutions. For each fiscal year covered by the Compact, the Secretary shall make available

the funds specified for that fiscal year under the Annual Funding Agreement by paying the respective total amount as provided for in each Annual Funding Agreement in advance lump sum, unless otherwise provided in a schedule set forth in the Annual Funding Agreement. The first payment shall be made on or before ten calendar days after the date on which the Office of Management and Budget apportions the appropriations for that fiscal year for the programs, activities, functions and services subject to the Compact.

(b) Interest on Advances. The Tribes shall be permitted to retain interest earned on funds advanced pending disbursement as authorized by law. Interest earned on advances shall not diminish the amount of funds the Tribes are authorized to receive under the Annual Funding Agreement in the year earned or in any subsequent fiscal year.

(c) Interest on Late Payments. The Tribes shall be entitled to interest on late payments for all sums due the Tribes under this Compact and any Annual Funding Agreement as specified in the Prompt Payment Act to the extent not contrary to law.

(d) Carryover. Amounts made available pursuant to this Compact and associated Annual Funding Agreements shall remain available for expenditure without fiscal year limitation.

(e) Limitation of costs.—The Tribes shall not be obligated to continue activities that require an expenditure of funds for a program in excess of the amount of funds awarded under an Annual Funding Agreement for such program. If, at any time, the Tribes have reason to believe that the total amount required for performance of an Annual Funding Agreement or a specific activity conducted under such an Agreement would be greater than the amount of funds awarded under the Agreement, the Tribes shall provide reasonable notice to the Secretary. If the Secretary does not take

such action as may be necessary to increase the amount of funds awarded under the Annual Funding Agreement, the Tribes may suspend activities until such time as additional funds are awarded.

Section 5—Reports to Congress. In accordance with § 305 of Title III, the Secretary shall submit to the Congress a written report on July 1 and January 1 of each of the five years following the date of enactment of Title III on the relative costs and benefits of the Tribal Self-Governance Project. Such report shall be based on mutually determined baseline measurements jointly developed by the Secretary and the Tribes and shall separately include the views of the Tribes.

Section 6—Audits

(a) The Tribes shall provide to the Designated Official of the Secretary (as defined in Article V, Section 1) an annual single organization-wide audit as prescribed by the Single Audit Act of 1984, 31 U.S.C. § 7501, *et seq.*, and shall adhere to generally accepted accounting principles and the applicable Circulars of the Office of Management and Budget (hereinafter "OMB"). A copy of this audit will be sent simultaneously to the Indian Health Service and the cognizant agency.

(b) For the term of this demonstration project, all provisions contained in the letter dated July 16, 1991, from the Office of Management and Budget (OMB) to the Department of Interior, attached hereto as Exhibit D, may be relied upon by the Tribes. The Tribes shall apply cost principles under the applicable OMB Circular, except as modified by the July 16, 1991, OMB Letter, by the provisions of section 106(k) of the Indian Self-Determination Act, as amended, and by any exemptions subsequently granted by OMB. The Secretary will assist the Tribes in obtaining such additional waivers from OMB as are requested by the Tribes. No other audit or accounting standards shall be required by the Secretary. Any

claim by the Federal Government against the Tribes shall be subject to the provisions of § 106(f) of the Indian Self-Determination and Education Assistance Act, as amended.

Section 7—Records. The following provisions supplement tribal law on document disclosure and govern record keeping associated with the Compact.

(a) The Tribes shall maintain a record keeping system and provide the IHS reasonable access to records which permits the IHS to meet its minimal record-keeping requirements under the Federal Records Act, 44 U.S.C. 1301 et. seq., or which are needed in the event of a retrocession under this Compact or any associated Annual Funding Agreement.

(b) Tribal records which the Director demonstrates are required by law to be maintained as part of the IHS system of records shall be deemed Federal records, and shall be subject to the Privacy Act, 5 U.S.C. 552a et. seq., but shall not be subject to disclosure under the Freedom of Information Act, 5 U.S.C. 552, as applicable.

(c) The Tribes shall maintain in their record keeping system all documents necessary for the annual audit requirement in Section 5 of Article I, and shall provide reasonable access to such records to the IHS for such purposes.

Section 8—Property.

(a) At the request of the Tribes, the Secretary or an authorized representative shall to the extent permissible by federal regulation or law and utilizing the Title I of P.L. 93-638 process make available and/or transfer title to the Tribes reasonably divisible real property, facilities, equipment, and personal property that the Department had previously utilized to provide the program, activities, functions and services consolidated by the Tribes in accordance with the provisions of this Compact. A list agreed upon by the Secretary and the Tribes specifying the property, facilities, and equipment so

made available shall also be prepared and periodically revised.

(b) The Tribes shall have the authority to acquire such "excess" and "surplus" property as may be appropriate in the judgment of the Tribes to support the programs, activities, functions, and services designated in the Tribes' Annual Funding Agreement. The Secretary, or an authorized representative, agrees to make her best efforts to assist the Tribes in obtaining such surplus, confiscated or excess property as may become available to Indian Tribes or local governments. A Screener Identification Card (General Services Administration Form 2946) shall be issued to the Tribes no later than the effective date of this Compact. The Designated Official upon request shall assist the Tribes in securing the use of this Card.

(c) The Tribes will determine what capital equipment, leases, rentals, property or services, they will require to perform their obligations under this Compact, and will acquire, and maintain records of, such capital equipment, property rentals, leases, property or services through their own internal procurement procedures.

(d) Management of property under this Compact will be in accordance with the Tribes' internal property management procedures.

(e) Upon request of the Tribes, the Secretary shall enter into a lease with the Tribes in accordance with section 105(1) of the Indian Self-Determination Act, as amended.

Section 9—Regulatory Authority. The Secretary and the Tribes agree to utilize the following procedures governing the establishment and application of program, rules and regulations under this Compact:

(a) Program Rules. The Tribes shall not be required to comply with federal program guidelines, manuals, or policy directives other than those identified in this section or in the

Tribes' Annual Funding Agreement in carrying out the programs, services, activities and functions under the Compact.

(b) Federal Regulations.

(1) Applicable Federal Regulations. The Tribes, in carrying out the provisions of this Compact and the Annual Funding Agreement, will be required to comply only with applicable federal regulations. To the extent that any section of Title I of the Indian Self-Determination Act, as amended, is, by its own terms or in some other manner made applicable to compacts under Title III, regulations promulgated pursuant to section 107 of the Act to implement such section are considered "applicable" federal regulations.

(2) Waiver of Federal Regulations.

(A) The Secretary and the Tribes will seek to identify any federal regulations which may require waiver in order to effectively carry out the Annual Funding Agreement. Any applicable regulations promulgated under section 107 are subject to the special exception and waiver provisions contained in section 107(e) of the Indian Self-Determination Act, as amended.

(B) The Secretary agrees to assist the Tribes in obtaining, from the appropriate office within or outside the Department of Health and Human Services, waivers of regulations in accord with the following process:

(i) If the Tribes decide that a regulation should be waived such request must be submitted in writing to the Director, Office of Tribal Self-Governance (OTSG). The request shall indicate that the Tribes have researched the matter carefully and made their best determination concerning what exactly needs to be waived. The request should also contain alternative methods of dealing with the matter, if applicable, or justify why no alternative methods will be sufficient. If nonprivileged legal research has been

done on the matter, this should be included in the waiver request to expedite the review process. When requesting a waiver the Tribes are encouraged to discuss the matter with the Director, OTSG, and other federal officials as appropriate, prior to filing the request in order to explore options under existing law and regulation and to aid in expediting the request.

(ii) After the request is submitted to and received by the Director, OTSG, acknowledgement of receipt will be made in writing. The request shall be reviewed to determine the following:

(a) What department, agency or component thereof, if any, has authority to grant the waiver?

(b) Which Indian Health Service programs, activities, functions or services are involved and what is the Indian Health Service input on the matter? For example, will granting the waiver have an impact on a portion of such program, activity, function or service which remains with the Indian Health Service?

(c) What are the policy implications of the request for the Indian Health Service?

(iii) At a minimum, this review would involve receiving input form the Office of General Counsel, and the appropriate program offices of the Indian Health Service.

(iv) The Director, OTSG, shall, within 30 days of receipt, forward the request, through appropriate channels, along with the Director's recommendations, to the appropriate department, agency or component having authority to grant or deny the request. A copy of the recommendations of the Director, OTSG, shall also be sent to the Tribes. The Director, OTSG, shall, to the extent consistent with his or her review of the request, recommend to such agency or component that the request be granted in an expeditious

manner and shall report to the Tribes on the status of the request at 30 day intervals until a decision is reached. The Director, OTSG, shall make every effort to secure a decision on the request within a reasonable period of time.

Section 10—Disputes.

(a) All disputes between the Indian Health Service and the Tribes shall be subject to the provisions of § 110 of the Indian Self-Determination and Education Assistance Act, as amended, and all remedies provided for therein shall be available to the Tribes. Actions and proceedings to enforce the Tribes' rights and the Secretary's obligations under this Compact shall be subject to the Equal Access to Justice Act, Public Law 96-481, as amended, to the same extent as are actions and proceedings involving Public Law 93-638 contracts.

(b) In the alternative, the Indian Health Service and the Tribes may use the processes authorized and encouraged in the Administrative Dispute Resolution Act, 5 U.S.C. § 571 note, for more informal resolution of disputes arising under this Compact and associated Annual Funding Agreement.

Section 11—Retrocession.

(a) The retrocession provisions of Section 105(e) of the Act, as amended, are herein adopted.

(b) The parties agree that the funds which the Tribes have remaining unexpended at the time of a retrocession shall be made available to the Secretary to provide services for those programs retroceded to the IHS pursuant to this clause.

(c) In the event of a retrocession, nothing in this Compact shall be construed as preventing the Tribes from submitting a proposal for a grant or contract under Title I of the Act to operate any of the programs, functions or services governed by this Compact and Annual Funding Agreement.

In such event, the Tribes shall maintain their mature contractor status.

(d) At the Tribes' option, the Tribes may elect to retrocede only a portion of the programs, functions, services or activities undertaken under this Compact and the associated Annual Funding Agreement. In that instance, the amount of funds and the property remaining in the Tribes' possession for purposes of carrying out the programs, functions, services or activities retroceded shall be returned to the Secretary under this retrocession procedure.

Section 12—Successor Annual Funding Agreements.

(a) Negotiations for a successor Annual Funding Agreement, as provided for in Article VI, Section 2, shall begin no later than 150 days in advance of the conclusion of the preceding Annual Funding Agreement. Pursuant to § 301 and § 303(a) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall make his or her best efforts to continue and promote this demonstration project in preparing budgets for subsequent years. The Tribes are hereby assured that future funding of the Tribes' successor Annual Funding Agreement shall only be reduced pursuant to the provisions of § 106(b) of the Indian Self-Determination and Education Assistance Act, as amended, provided, however that future funding for the Tribes' non-recurring funds and tribal shares shall be subject to adjustments in accordance with a yearly reallocation decision by the Tribes. The Secretary agrees to prepare and supply relevant information, and promptly to comply with the Tribes' requests for information reasonably needed to determine the funds that may be available for a successor Annual Funding Agreement as provided for in Article VI, Section 2 of this Compact.

(b) If the parties are unable to conclude negotiation of a successor Annual Funding Agreement, the terms of this

Compact and the existing Annual Funding Agreement shall, at the option of the Tribes, continue on in 30 to 90 day increments until a successor Annual Funding Agreement is agreed to. Any increases in funding to which the Tribes are entitled by statute, or increases which the Tribes subsequently negotiate, shall be included in the successor Annual Funding Agreement.

Section 13— Annual Evaluation, Baseline Measurements and Evaluation Criteria. Annual evaluations of the programs, activities, functions and services under this Compact and the Annual Funding Agreement shall be conducted in accordance with baseline measures, which shall include the procedures and criteria for conducting the evaluation and which shall be negotiated between the Secretary and the Tribes.

Section 14— Secretarial Approval. For the term of the Compact, the provisions of 25 U.S.C. § 81 and 25 U.S.C. § 476 shall not apply to attorney and other professional contracts of the Tribes.

Section 15— Transportation.

(a) Use of Motor Vehicles. The Secretary hereby authorizes the Tribes to obtain Interagency Motor Pool vehicles and related services for performance of any programs, activities, functions and services under this Compact.

(b) Use of Other Transportation Services. The Tribes, and their employees, operating under this Compact, and while carrying out an applicable Annual Funding Agreement, shall be able to use discounts and special fares negotiated by the Federal Government with private entities, including airlines and other common carriers, to the same extent those discounts and special fares are available to the Federal Government. The foregoing shall be in accordance with section 105(k) of the Indian Self-Determination Act, as amended.

ARTICLE III—OBLIGATIONS OF THE TRIBES

Section 1— Consolidation. The Tribes shall be responsible for performing the health programs, activities, functions and services as specified in Section 3 of this Article III and in their respective Annual Funding Agreement, as provided for in Article VI, Section 2 of this Compact. To the extent a program, activity, function, or service included within a contract or grant entered into pursuant to §§ 102 or 103 of the Indian Self-Determination and Education Assistance Act, as amended, is included within an Annual Funding Agreement, that contract or grant shall be modified or terminated as appropriate. The parties' obligations shall be governed by this Compact and all funds previously obligated under contracts or grants (including carry-over funds) may be re-obligated to the Tribes under the applicable Annual Funding Agreement. Such terminated contracts shall be identified by contract number in the Annual Funding Agreement.

Section 2— Amount of Funds. The total amount of funds covered by the consolidation and redesign provided for in Section 1 of this Article that the Secretary shall make available to the Tribes shall be determined in accordance with § 303(a)(6) of Title III and shall be set forth in the respective Annual Funding Agreement between the Secretary and the Tribes.

Section 3— Compact Programs. The health programs, activities, functions and services identified in the Tribes' Annual Funding Agreement will be the responsibility of the Tribes under this Compact.

Section 4— Eligibility for Services. In determining eligibility for services, the Tribes shall comply with applicable eligibility provisions set forth in the Indian Health Care Improvement Act, as amended, applicable regulations, and other statutory law.

Section 5— Reallocation. Reallocation of funds to other health programs, activities, functions, or services shall not require Secretarial consent, except that the use of funds pursuant to this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations Acts. In addition, funds may not be transferred from one Indian Health Service appropriations account to another. (Specifically, funds from Indian Health Service's services accounts may not be used for purposes for which funds in the Indian Health Service's facilities accounts are appropriated, and vice versa, except as authorized by law.) Funds may be used to meet matching and other cost participation requirements under other federal, state and other health programs, where not prohibited by statute.

Section 6— Merging with Other Programs. The Tribes may merge programs, activities, functions and services provided under their Annual Funding Agreement with other health programs, activities, functions and services provided with their own funds or funds from other sources. In such cases, the Tribes shall not be required to separate dollars or programs, activities, functions and services so long as the Tribes can provide sufficient data to permit an acceptable program and financial audit to be conducted.

Section 7— Program Income, including Medicare /Medicaid. All Medicare Medicaid or other program income received by a Tribes shall be treated as additional supplemental funding to that negotiated in the Annual Funding Agreement and the Tribes may retain all such income, including Medicare/Medicaid, and expend such funds in the current year or in future years, nor shall such funds result in any off-set or reduction in the negotiated amount of the Annual Funding Agreement. Medicare/Medicaid collections of a Tribes under Title IV of Public Law 94-437, as amended, shall be used by the Tribes in accordance with any applicable statutory restrictions on the use of such funds.

Section 8— Carry-over. Congressionally appropriated funds allocated in accordance with an Annual Funding Agreement under this Compact are "no year" funds and may be expended by the Tribes in accordance with their budget for the year for which the funds are appropriated or carried over and expended in any subsequent fiscal year, and such carry-over shall not diminish the amount of funds the Tribes are authorized to receive under their Annual Funding Agreement for any such subsequent fiscal year.

ARTICLE IV— OBLIGATIONS OF THE UNITED STATES

Section 1— Trust Responsibility. Nothing in this Compact waives, modifies, or diminishes in any way the trust responsibility of the United States with respect the Tribes which exists under treaty, executive orders, and acts of Congress.

Section 2— Programs Retained.

(a) The Secretary hereby retains the responsibility for the programs, activities, functions and services with respect to the Tribes that are not specifically assumed by the Tribes through their Annual Funding Agreement and they shall continue to be entitled to the full benefit of those programs, activities, functions, and services retained by the Indian Health Service. The Tribes shalt be eligible for new programs, activities, functions and services of the Secretary and the Indian Health Service on the same basis as other Tribes and Tribal Organizations. The Indian Health Service, in consultation with the Tribes, may reorganize to sustain its ability to provide, in the most effective and efficient manner, all programs, activities, functions, and services that have not been included in the Annual Funding Agreement.

(b) No later than 150-days prior to the end of each fiscal year, the Indian Health Service shall provide the Tribes with a written list of the retained programs, activities, functions, and services relevant to the Shoshone-Paiute Tribes and the Owyhee Service Unit for the upcoming fiscal year.

To the fullest extent permitted by law, the Secretary shall provide the Tribes, upon request, with access to, and copies of, all documents and other information relevant to any ongoing retained programs, activities, functions, or services, and shall cooperate with any evaluation which the Tribes may wish to conduct. The foregoing reports shall include (a) quarterly IHS Status of Allowance reports from Headquarters concerning Phoenix Area allowances, (b) periodic status of allowance reports of the Phoenix Area Office concerning all programs, activities, functions, services and activities comparable to those performed by the Tribes under this Compact, and (c) all revisions to the plans, guidelines or budgets of the Phoenix Area relating to such comparable programs. The Secretary will cooperate with the Tribes to facilitate the inclusion of programs, activities, functions and services in future Annual Funding Agreements of the Tribes.

Section 3— Financial and Other Information.

(a) To assist the Tribes in monitoring compliance with § 303(a)(6) of the Indian Self-Determination and Education Assistance Act, as amended, the Secretary shall provide to the Tribes:

(1) all monthly reports of obligations and allowances, including all reports from Central Office, Headquarters, the Office of Tribal Self-Governance and the Phoenix Area Office, concerning funds provided to support programs, activities, functions and services provided by the Tribes under this Compact and funds retained by the Indian Health Service to support programs, activities, functions and services retained by the Indian Health Service;

(2) revisions in such program plans, guidelines or budgets as they are made; and

(3) prompt notice of any new programs, activities, functions and services for which the Tribes or Tribes are

eligible, including the funding available for such programs, activities, functions and services.

(b) The Secretary shall prepare and promptly supply relevant financial information and comply with the Tribes' request for information needed to determine funds that may be available for a successor Annual Funding Agreement. Such written information shall be provided to the Tribes within 30 days of their request.

Section 4— Termination of the Demonstration Project. Prior to the expiration or termination of the Compact, the Secretary shall, to the extent permitted by law and regulation and at the request of the Tribes, negotiate a contract or contracts under Title I of the Indian Self Determination and Education Assistance Act, as amended, to provide, as requested by the Tribes, all of the programs, activities, functions or services and the resources authorized under Title I.

Section 5— Access to HIS Support Services, Programs and Facilities.

The United States shall maintain the Tribes' eligibility for, and equal access to, all programs, services, functions and activities of the Department and other federal agencies which would otherwise be available to the Director to serve or support the Tribes' service population if the programs, services, functions and activities operated by the Tribes pursuant to this Compact and the attached Annual Funding Agreement were instead operated by the Indian Health Service (including, without intending any limitation, eligibility for special pay, change of station pay, other special benefits available to medical personnel such as recruitment and retention benefits, and all similar benefits).

ARTICLE V— OTHER PROVISIONS

Section 1— Designated Officials/Agent.

(a) Parties. On or before the effective date of this Compact, both the Secretary and the Tribes shall provide a written designation of an individual as their representative/liaison. The Secretary shall direct all communications about the Compact, and relevant Annual Funding Agreement, to the Tribes' designated representative. Reference herein to the Tribes or the Secretary shall include the respective Designated Official thereof.

(b) Agent for Notice. If the Tribes assign an agent to accept and distribute notices, the Tribes shall provide the name and address of the agent and a description of the limited powers and duties of the agent.

Section 2— Indian Preference in Employment, Contracting and Sub-Contracting. Section 7(b) and (c) of the Indian Self-Determination Act, as amended, relating to use of Indian business concerns and Indian preference in training and employment, shall apply to the procurement and employment policies of the Tribes. The parties agree that the Tribes may comply with any Indian preference established by the Tribes, including preference based on tribal affiliation.

Section 3— Federal Tort Claims Act Coverage; Insurance.

(a) The Tribes are deemed by statute to be part of the Public Health Service (PHS), and the employees of the Tribes are deemed by statute to be part of or employed by the Public Health Service, for purposes of coverage under the Federal Tort Claims Act, while performing programs, activities, functions or services under this Compact and any applicable Annual Funding Agreement, including coverage for claims of medical malpractice, as is more fully described in the Indian Self-Determination Memorandum No. 92-1, attached hereto as Exhibit E, incorporated by reference herein. Such coverage

shall be coextensive with the coverage provided Indian tribes under section 314, Pub. L. 101-512 (as amended) and section 102(d) of the Indian Self Determination Act (as amended).

(b) The above status of the Tribes, or an employee's status as an employee of the Tribes, is not affected by the source of the funds used by the Tribes to pay the employee's. salary and benefits as long as the employee does not receive any additional compensation for the performance of covered services from anyone other than the Tribes.

(c) The Tribes' employee may, while performing under this Compact and the Tribes' Annual Funding Agreement and as a condition of employment, be required by the Tribes to provide services to non-Indian Health Service beneficiaries in order to meet the obligations under this Compact either in facilities of the Tribes or in facilities other than those of the Tribes.

(d) Funds provided under an Annual Funding Agreement may be used to purchase such additional liability and other insurance as is prudent in the judgment of the Tribes performing under this Compact and Annual Funding Agreement for their protection and the protection of their employees.

(e) Except as otherwise provided by law, nothing in this Compact shall either enhance or diminish the liability of the United States for any claims arising prior to the effective date of this Compact. In particular, the United States will maintain the Tribes eligibility for Catastrophic Health Emergency Fund (CHEF) money on par with all other Indian Health Service Units and tribal self-determination contract operations and for other catastrophic health care funds as may be available from time to time on a par with all other Indian Health Service Units and tribal self-determination contract operations.

(f) Personal services contracts shall be covered under this provision to the extent authorized under section 102(d) of the Indian Self-Determination Act, as amended.

Section 4— Compact Modifications or Amendments. Any request for a modification of this Compact must be communicated in writing to the Tribes and to the Indian Health Service. To be effective any modifications of this Compact shall be in the form of a written amendment to the Compact, and shall require written consent of the Tribes, acting directly or through an agent authorized by resolution, and the Secretary.

Section 5—Construction. To the extent permitted by law, and according to the terms of applicable appropriations acts and other relevant authority, this Compact shall apply to funds included in the facilities category of Indian Health Service appropriations. Section 7(a) of the Indian Self-Determination Act, as amended, shall apply to any construction activities transferred to the Tribes under this provision.

Section 6— Officials Not To Benefit. No member of or delegate to Congress shall be admitted to any share or part of any Compact executed pursuant to this Compact, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to any contract under this Compact if made with a corporation for its general benefit.

Section 7— Covenant Against Contingent Fees. The parties warrant that no person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Compact upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Section 8— Penalties. The parties agree that the criminal penalties set forth in 25 U.S.C. § 450d apply to all activities conducted pursuant to this Compact.

Section 9— Use of Federal Employees. Section 104 of the Indian Self-Determination and Education Assistance Act, as amended, shall apply to this Compact and to any individuals assigned or detailed to the Tribes performing functions under this Compact or leaving federal employment to perform services under this Compact, including assign-ments either on detail or on leave without pay and with or without reimbursement by the Tribes for the travel and transportation expenses to or from the place of assignment, and for the pay, or supplemental pay, or any part thereof, of the employee during assignment.

Section 10— Extraordinary or Unforeseen Events. This Compact is intended to obligate the Tribes to carry out all usual and ordinary functions respecting the programs, activities, functions and services that they are undertaking to assume responsibility for under their Annual Funding Agreement. In the event major unforeseen or extraordinary events occur, as jointly identified by the Tribes and the Secretary, with consequences beyond the control of the Tribes, that the Trams shall have access to additional services and funding amounts for their Annual Funding Agreement as described in the Annual Funding Agreement. The parties will seek to ensure that funds available to the Tribes to deal with the unforeseen circumstance will not be less than would have been available to non-Compact Tribes or the Indian Health Service had they encountered a similar circumstance. The Tribes' participation in the Indian Health Service Catastrophic Funds will be identified in the Tribes' Annual Funding Agreement.

Section 11— Mature Contractor Status upon Compact Termination. Should the Tribes elect to convert all or some of the programs operated under the Compact back to contract

status under Public Law 93-638, such conversion shall not affect the Tribes' status as a Mature Contractor. Such conversion would occur only at the end of the Compact term, on another date mutually acceptable to the Tribes and the Secretary, or as otherwise provided in this Compact, and will be implemented in a manner which avoids any interruption of services to individual tribal members. If the Compact is terminated or the Tribes determine that they will retrocede any program, activity, function or service operated under the Compact, the Tribes shall not lose their Mature Contractor status.

Section 12— Startup Costs. Startup costs may be separately negotiated by the Tribes and if available shall be included in the Tribes' Annual Funding Agreement. Startup costs are designed to compensate the Tribes for costs associated with implementing this Compact which he Tribes would not normally incur. Upon agreement to such costs on an annual basis, funds for such costs shall be included in the Annual Funding Agreement, if available.

Section 13— Contracting Rights. Nothing in this Compact or in any Annual Funding agreement shall be construed to preclude the Tribes from contracting with the Secretary to Perform a program, activity, function, or service under Title I of P.L. 93-638, subject, however, to § 303(b)(1) of Title III.

Section 14— Sovereign Immunity. Nothing in this Compact or in any Annual Funding Agreement shall be construed to affect the sovereign immunity of the Tribes.

Section 15— Interpretation Of Federal Law. In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret federal law and regulations and this Compact in a manner that effectuates and facilitates the purposes of this Compact in accordance with § 303(e) of Title III.

Section 16— Inadequacy of Program Funding. The parties to this Compact understand that the Indian Health Service budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians and that, accordingly, the funds provided to the Tribes are inadequate to permit the Tribes to achieve this goal. The Secretary commits to advocate for increases in the Indian Health Service budget to further the ability of the Tribes to provide the full range of services that are the responsibility and obligation of the United States to make available to American Indian people and to meet the goals of the Indian Health Care Improvement Act.

Section 17— Effect on Non-Compacting Tribes.

(a) Nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the service, contracts or funds that any Indian Tribe or tribal organization is eligible to receive.

Section 18— Disasters and Emergencies. The United States will maintain the Tribes' eligibility for special disaster relief and assistance programs as the same may from time to time become available, and shall retain responsibility to assist the Tribes in responding to natural or other disasters, emergencies, and unforeseen acts of God.

Section 19— Severability.

(a) Except as provided in this section, this Compact shall not be considered invalid, void, or voidable if any section or provision of this Compact is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Compact is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Compact as invalid, void, or voidable, in accordance with the provisions of this Compact.

(c) In the event that the parties decide not to treat the Compact as invalid, void or voidable under subsection (b) of this section, the parties will seek agreement to amend, revise or delete any such invalid, unlawful or unenforceable section or provision, in accordance with the provisions of this Compact.

ARTICLE VI — ATTACHMENTS

Section 1— Approval of Compact. The resolution of the Tribes approving this Compact is attached as Exhibit A.

Section 2— Presidential Memorandum. The April 29, 1994 Memorandum from the President of the United States to the Heads of the Executive Departments and Agencies is attached as Exhibit B.

Section 3— Annual Funding Agreement. The Tribes' Annual Funding Agreement is attached hereto as Exhibit C.

Section 4— OMB Letter. The July 16, 1991 letter from the Office of Management and Budget to the Depart-ment of the Interior is attached as Exhibit D.

Section 5— Federal Tort Claims Act. Indian Self-Determination Memorandum No. 92-1 is attached as Exhibit E.

ARTICLE VII— COUNTERPART SIGNATURES

This Compact may be signed in counterparts:

United States of America

Department of Health
and Human Services

/By/ [Illegible]

Director, Indian Health Service
Date: 6-30-95

SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION

/By/ Renee Rose
Renee Rose, Vice Chairperson for
Lindsey Manning, Chairman

DATE: June 28, 1995

COMPACT OF SELF-GOVERNANCE

between the

DUCK VALLEY SHOSHONE PAIUTE TRIBES

and the

UNITED STATES OF AMERICA

October 1, 1994, as amended October 1, 1995

AMENDMENT NO. 1

The parties hereby agree to add the following section 16 to Article II of the Compact of Self-Governance.

16. Title I Provisions. Pursuant to section 19, Pub. L. 104-109, the following provisions of Pub. L. 93-638, as amended, shall apply to this Compact, and the term "contract" as set forth in those previsions, shall include this Compact and its associated annual funding agreements:

sections 7(b) and (c) (relating to Indian preference and the Tribes' employment and contract preference laws);

section 8 (carryover authority);

section 102(d) (Federal Tort Claims Act protection for claims arising out of the performance of this Compact);

section 103 (tribal grants);

section 104 (use of federal personnel);

section 105(a)(1) (exemption from federal procurement and other contracting laws and regulations);

section 105(f)(property);

section 105(k) (access to federal sources of supply);

section 105(l) (leasing of tribal facilities);

section 105(m) (construction);

section 106(a) (minimum compact funding);

sections 106(b)~~(1) through (5)~~ (prohibitions against funding reductions); [illegible initials]

section 106(c)(2) (contract support deficiency reporting to Congress);

section 106(c)(6) (service level reporting to Congress);

section 106(d) (exemption from adverse adjustment due to shortfalls in recoveries);

section 106(f) (limitations period for right of action or other remedy relating to cost disallowance);

section 106(j) (use of Compact funds for matching or cost participation requirements)

section 106(k) (allowability of cost expenditures);

section 106(m) (program income);

section 106(n) (unanticipated Secretarial savings);

section 110 (judicial and administrative remedies);

section 111 (tribal sovereign immunity and United States trust responsibility); and

the following subparagraphs of section 108(c):

1(b)(5) (limitation of costs);

1(b)(6)(B)(iii) (payment of interest under the Prompt Payment Act);

1(b)(7)(A) (exemption of tribal records from the Freedom of Information Act);

1(b)(8)(A) (transfer of divisible property);

1(b)(8)(C) (joint use agreement regarding nondivisible property);

1(b)(8)(D) (Tribal authority to acquire excess property);

1(b)(8)(E) (Secretarial assistance in obtaining confiscated or excess property);

1(b)(8)(F) (issuance of screener identification card);

1(b)(9) (availability of funds);

1(b)(10) (Tribal authority to obtain interagency motor pool vehicles and related services);

1(b)(11) (exemption from program guidelines, manuals, and policy directives);

1(d) (obligations of the United States); and

1(e)(2) (Compact and annual funding agreement modifications).

UNITED STATES OF AMERICA
DEPARTMENT OF HEALTH AND HUMAN SERVICES

By: /s/ Michael [illegible]
DIRECTOR, INDIAN HEALTH SERVICE
DATE: 5/16/96

SHOSHONE-PAIUTE TRIBES OF THE
DUCK VALLEY RESERVATION

BY: LINDSEY MANNING
Lindsey Manning, Chairman
Date: 3/6/96

Annual Funding Agreement
between the
DUCK VALLEY SHOSHONE-PAIUTE TRIBES
and the
Secretary of the Department of Health and Human Services
of the
UNITED STATES OF AMERICA

October 1, 1995

This Annual Funding Agreement is entered into by and between the Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America.

Section 1—Obligations of the IHS.

This Annual Funding Agreement ("Agreement" or "AFA") obligates the Indian Health Service (IHS) to provide funding and services identified herein in Fiscal Year 1996 and as provided is the Shoshone-Paiute Tribal Health Compact ("Compact") between the Duck Valley Shoshone Paiute Tribes and the United States as amended.

Without intending any limitation, the Phoenix Area Office will also continue to provide, but will not be limited to providing, without charge to the Tribes and upon request, technical assistance to the extent doing so does not diminish services to other tribes. The Phoenix Area Office also will continue to provide services, which will include, but not be limited to:

A. Purchasing activities under GSA contracts.
B. Administration & Management of IPAs/MOAs.
C. Region IX Legal Consultation.
D. Access to the Phoenix Indian Medical Center and related facilities, specialty or other clinics, and programs.
E. Others to be added.

Further, the Phoenix Area Office shall also provide the following services not funded under this Annual Funding Agreement:

1. Training and related travel.

The parties acknowledge that the majority of training and related travel for the positions covered by this AFA is funded on a non-recurring basis by the Area Office. The parties agree that the Tribes shall remain eligible on an equal basis with other programs operated by the Indian Health Service for such additional non-recurring training and related travel. The Indian Health Service (including each phoenix Area program director) shall on no less than a quarterly basis inform the Tribes of training opportunities available for positions covered by this AFA. Tribal training requests shall be routed through the Area program directors or the Area Director, as appropriate.

2. Quarters.

The Tribes shall receive all quarters rents from quarters occupants (including direct payments from IPAs and MOAs), and shall provide the Phoenix Area with an annual report of all quarters collections. Reimbursements received by the Owyhee Service Unit in the form of rents on government quarters for persons carrying out this AFA shall be retained at the service unit for purposes of maintenance and improvement of the quarters. Such retention shall not affect the eligibility of the quarters for maintenance and improvement funding, nor shall it affect the eligibility of the quarters to participate in the Area quarters pool, provided that the Tribes have not previously received their shares of the Area maintenance and improvement funds or Area quarters pool funds.

The parties agree that the maintenance and improvement and similar projects (with estimated completion dates) listed on the attached five-page list comprising Appendix B (together with the Owyhee Hospital diesel fuel cleanup

project and parking lot restoration project) shall be completed by the Phoenix Area Office, without charge to the Owyhee Service Unit, and that every effort shall be made by the Area to complete such projects prior to October 1, 1995.

3. Vehicles.

The Tribes shall have access to the GSA motor vehicle pool on the same basis as did the Service Unit prior to the effective date of this Agreement, subject either to the Indian Health Service agreement with the General Services Administration (GSA) or a separate tribal agreement with the GSA.

4. Federal Sources of Services and Supply.

The Phoenix Area Office shall issue a letter to the Tribes confirming the Tribes' eligibility to access federal sources of services and supply as an executive agency of the United States, and the Indian Health Service shall assist the Tribes in accessing such sources, including air carriers.

5. Printing and duplicating.

The Tribes shall, without charge to the Tribes, retain access to GSA printing services, and shall retain access to the IHS clinical support center for printing and duplicating services on the same basis as would apply if the programs listed in section 3 were being operated by the Indian Health Service.

6. Library.

The Phoenix Area Office shall consider the Tribes' requests for library maintenance needs (e.g. journals, publications and the like) on the same basis as similar requests from IHS-operated programs. The Indian Health Service will provide at no charge to the Tribes instruction and related technical training and support to the Tribes for on-line medical support computer services, under the guidance of the Phoenix Area Health Advisor.

7. Space.

The Indian Health Service shall, without cost to the Tribes, remodel the basement space in the Owyhee Community Hospital for use by persons carrying out Paragraph 3-A of this Agreement and the Compact. The remodeling project shall proceed as specified in Appendix D to this Agreement.

8. Phones.

The Tribes shall, without charge to the Tribes, retain access to FTS-2000 lines to carry out the Compact.

9. [RESERVED]

10. Property.

A. Title to all property presently used in connection with the portion of the Owyhee Service Unit covered by this Agreement, other than realty, shall be transferred to the Tribes utilizing the Title I Process. A list shall be prepared by the Indian Health Service inventorying all such property and the list shall be reconciled by the parties on or before October 1, 1995.

B. A use agreement shall be negotiated and executed by the parties on or before October 1, 1995 to cover use by the Tribes of all federal realty associated with the programs covered by Section 3 of this Agreement.

C. The Tribes shall be eligible for replacement of equipment used in connection with the Compact and this Agreement on the same basis as the Indian Health Service, as if the Indian Health Service were operating the compacted programs. This paragraph shall not apply to the extent the Tribes' Headquarters share includes equipment replacement funds.

Section 2— Obligations of the Tribes.

The Agreement obligates the Tribes to be responsible for the health programs, activities, functions, and services identified in Section 3, utilizing the resources transferred under this Agreement. This Agreement further authorizes the Tribes to consolidate and redesign programs, activities, functions, and services as provided in the Indian Self-Determination and Education Assistance Act, as amended, and the Compact.

Section 3— Tribal Programs and Budget.

The Tribes agree to be responsible for the health programs, functions, activities, and services identified below in accordance with the Compact and this Agreement, subject to the Tribes' right to redesign such programs as provided in the Act. For the purposes of this Agreement, the Tribes General Budget categories consolidate related health programs, activities, functions and services as listed below. Services are provided on the Duck Valley Reservation of Nevada and Idaho. Programs, activities, functions and services will be maintained and operated in accordance with the applicable standards of the Joint Commission on Accreditation of Health Organizations.

The applicability of the Federal Tort Claims Act shall be pursuant to Article V, Section 3 of the Shoshone-Paiute Tribal Health Compact, to section 102(d) of the Act, as amended, and to section 314 of Pub. L. No. 101-512, as amended.

A. Community Oriented Primary Care Program

The Community Oriented Primary Care Program will promote the wellness of tribal members through direct services, coordination of outside services, health promotion and disease prevention, and community education and

training. Essential elements of the Community Oriented Primary Care Program are:

1. Inpatient Hospital Services

Inpatient hospital services will be provided in the 15 bed Owyhee Community Hospital facility. Comprehensive general medical services will include doctor care, room and board, general nursing care, diagnostic tests, drugs and medical supplies.

2. Outpatient Clinical Services

The outpatient clinic will provide a comprehensive range of services including diagnosis and treatment of illness or injury; preventive care, including well baby care; periodic check-ups and routine immunizations; laboratory tests and radiological examinations. The outpatient clinic will be in operation daily Monday through Friday (holidays excluded). Primary care shall be provided by physicians and physician extenders following acceptable written protocols. They shall be supported in their efforts by registered nurses.

3. Emergency Medical Services

Emergency medical services will be provided 24 hours a day at the Owyhee Community Hospital facility. Ambulance services shall be provided 24 hours a day. Ambulance services shall be staffed by level 1 and level 2 qualified Emergency Medical Technician personnel.

4. Pharmacy Services

Prescription drugs prescribed by a Tribal Health Program doctor or referral doctor or any licensed dentist will be provided by the pharmacy at the Owyhee Community Hospital. Pharmaceuticals will be provided by a licensed registered pharmacist in accordance with State and Federal laws.

5. Medical Records

A system will be in operation which provides for the collection, processing, maintenance, prompt retrieval, and distribution of patient records according to established policies and procedures. The confidentiality, security, and safety of patient records will be ensured.

6. Medical Laboratory

Medical laboratory services will be provided under the supervision of a qualified laboratory technologist with consultation from a local pathologist. Medical laboratory services will be available 24 hours a day.

7. Radiology Services

Radiology services will be provided under the supervision of the clinical director with consultation from a board certified radiologist. Appropriate diagnostic radiology services will be immediately available 24 hours a day.

8. Dental Services

A comprehensive range of dental services will be provided at the dental clinic in the Owyhee Community Hospital. Services will include diagnostic services and preventive care; restorative services; oral surgery; periodontics; endodontics; and prosthetic devices.

9. Mental Health and Social Services

Mental Health and Social Services will include a full range of psychological and social services for both inpatients and outpatients, including counseling, psycho diagnosis, and the application of psychological principles, theories, methods and techniques. Psychological tests will be administered and interpreted. Medical problems will be referred to appropriate medical staff. Social services shall be provided in hospital, community and individual settings.

10. Public Health Nursing

Public Health Nursing Services will provide a variety of clinical and field nursing services to patients/clients and their families including screening, evaluation, counseling, discharge planning, consultation, referral to community resources and assisting clients in the optimum utilization of needed Federal, State, local and private community resources.

11. Health Education

The Health Education component will provide health promotion and disease prevention education and teach physical and mental health concepts, effective living skills and wellness in the family. Assessment of community health care needs and evaluation of community resources will be performed in collaboration with other program components.

12. Community Health Representative Services

Community Health Representative Services will include health education presentations in community and individual home settings; client assistance in a variety of clinical settings such as maternal and child health, elderly, and diabetic clinics; client transportation; home health services and general promotion of wellness within the community.

13. Alcohol and Substance Abuse Services

Alcohol and Substance Abuse Services will promote the efficient practice and coordination of substance abuse services within the Community Oriented Primary Care Program. A comprehensive range of services will be provided to clients and families including screening, evaluation, group and individual counseling, referral to community resources and assisting clients in utilizing other resources.

B. Managed Care Program (Contract Health Services)

The Shoshone-Paiute Tribes will administer a Managed Care Program in order to provide comprehensive health

services for members and descendants of members of the Tribes and other Indians determined by the Tribes to meet Federal eligibility criteria for the program. The Managed Care Program will initially adopt the Indian Health Service CHS Standard Operating Procedures, including the Dental Program Schedule of Services. The Tribes retain the right to adapt and modify the IHS procedures to meet their own circumstances and priorities, to the extent that such modifications do not impinge upon the quality of health service delivered under the program. The Managed Care Program will develop and implement its own Standard Operating Procedures. The Shoshone-Paiute Tribes will provide services consistent with those authorized in the IHS CHS Standard Operating Procedure. The delivery of these services will be limited only by the availability of financial resources. The Tribes also retain the right to modify the Indian Health Service Medical Priorities Guidelines to best address the health priorities and needs of the Indian people served by the Managed Care Program.

C. Program Management and Administration

Overall policy and responsibilities shall reside with the Shoshone-Paiute Tribes and its designated Tribal Health Organization. The Tribal Health Program Director will serve as the focal point for coordination of all health services programs, functions, activities, and services. The Director shall be guided by the policies set down by the Tribe and its designated Tribal Health Organization. The Director shall be responsible for the daily operation of all programs and facilities. Authority for health care services and operational decisions shall generally be delegated to department heads. Authority for administrative decisions and operations shall be delegated as deemed necessary for effective and efficient operation of the organization. The Director shall be assisted

and supported by appropriate administrative specialists including hospital administrator, budget officer, patient business office manager, and information systems manager. The Tribe and/or its designated Tribal Health Organization shall provide general administrative support services including financial accounting and bookkeeping, payroll, insurance and risk management, internal control and audit, property and supply management, and human resource services.

D. Other Programs and Services Funded:

1. Any new health care program funded during FY 1996 including but not limited to programs identified in the Indian Health Care Improvement Act, as amended.

2. Any new health care program resulting from the reallocation of funds and redesign of programs during FY 1996 in accordance with the terms of the Compact.

3. Any new programs or services established by Federal or State legislation which the Shoshone-Paiute Tribes determine they accept. This would include any products of health care reform.

Section 4- Amounts Available in Fiscal Year 1996

(a) The following amounts are available to the Tribes pursuant to the Compact and Title III of the Indian Self-Determination and Education Assistance Act, as amended, and are subject to reductions only in accordance with Section 106 of that Act during the term of this Annual Funding Agreement (TBD means "To Be Determined"):

	Annual Funding
Recurring base: Inclusive of all recurring funding, including recurring contract support funds.[1]	$6,319,537
Non-recurring funding: Inclusive of non-recurring contract support funds and such other funding which maybe added to the contract. [2]	$212,791

[1] The specified amount includes $697,888, covering all programs specified in the Tribes' Annual Funding Agreement for FY 1995, as amended through Amendment No. 1, including recurring contract support cost funds and annual program increases for FY 1995, and as readjusted to cover a full 12 month fiscal year cycle. The specified amount also includes the sum of $2,848,555 for operation of the Owyhee Hospital and all related programs (based on FY 1995 figures), the sum of $1,200,000 for operation of the Managed Care Program (based on FY 1995 figures), and the sum of $1,573,094 in requested recurring direct and indirect contract support cost funds associated with both those programs.

The Tribes hereby request, and the Indian Health Service agrees, that the Headquarters Office of Tribal Activities (OTA) shall negotiate directly with the Tribes the Tribes' request for recurring and nonrecurring contract support cost funding, and that OTA shall promptly notify the Tribes of OTA's funding decisions, specific reasons for declining any requested amount, and the Tribes' appeal rights.

The amount set forth will be adjusted on or before January 1, 1996 to reflect annual program increases, as required by section 106(a)(1) of the Act, and such increased amounts shall be paid in a lump sum on that date.

[2] Of the specified amount, $212,791 has been requested as one-time start-up or preaward contract support funds and associated indirect costs in connection with the Managed Care Program described in section 3-B of this Agreement, and the hospital-operated portion of the Comprehensive Programs described in section 3-A of this Agreement. Other non-recurring funds will not be specifically identified in this Agreement, but will be provided to the Tribes in the future to the same extent as they would have been provided to the Owyhee Service Unit in the absence of this Compact. Without intending any limitation, these amounts shall include sums relating to such programs or initiatives as HP/DP, special pay, permanent change of station, IDS, and the clinical support center.

OTHER	TBD
Subtotal:	$6,532,328
Area "tribal" share to include funding identified from Area Office and identified in Appendix A to this Agreement.[3]	$213,609

The parties agree that the amount specified in the table shall be increased to add all remaining surplus funds (e.g. CHS and X account funds) allocated in FY 1995 or earlier to the portion of the Owyhee Service Unit that is subject to this Agreement, and which funds have been obligated but not expended by the Owyhee Service Unit prior to the effective date of this Agreement (and which have not previously been added to the Tribes' FY 1995 AFA, as amended (pursuant to footnote 2 of that AFA Amendment No. 1)).

[3] The Area tribal share was determined using a 30/70 (number of tribes/number of active users) formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount. The parties agree to adjust the calculation of Area tribal shares based upon the final FY 1996 congressional appropriation amounts, such adjustment to be finalized and paid no later than January 1, 1996.

Phoenix Area tribal shares for all Area tribal compactors are as set forth in the *Phoenix Area Office Self-Governance Summary-1995 Negotiations* (6/13/95 printout*) and the Source of AFA Area Office Resources (Estimated)*, FY 1996 *Duck Valley Tribal Negotiations, Phoenix Area Indian Health Service* (6/13/95 printout), subject to further amendment as set forth here and in section 9(c) of this Agreement. The parties agree that the formulae applied to calculate the Tribes' share of funds shall be applied equally to all Phoenix Area compactors. In the event such formulae are not so applied, this Agreement shall be subject to renegotiation.

The Tribes' Area tribal share for FY 1996 does not include recurring alcohol program dollars included in the tribal share due under the Tribes' FY 1995 Agreement, as amended. Instead, such sums are included in the Tribes' base amount for FY 1996.

As anticipated in footnote 3 of the original FY 1995 Agreement, as amended, and in the text of Amendment No 1 of that Agreement, the sum set forth herein reflects a revised active user count for the Tribes of 1,418. *See also* note 4.

The amount set forth herein includes the Tribes' share of Area M&I Large Project Pool Funds. The Tribes reserve the right during the term of

Headquarters-Tribal share: "tribal share adjustment" formula including all funds identified in Appendix A.[4]	$70,039
Headquarters-Tribal share: "program formula pool"-to include all funds identified in Appendix A, and such additional funds which the IHS may make available on a program formula basis during the year based on the programs accepted for this allocation in Appendix A.[5]	$10,423
ISDM support on the "tribal shares" identified above including funding from both Headquarters and Area Office as identified in Appendix A.[6]	TBD
Subtotal-Tribal Shares	$294,071
TOTAL COMPACT FUNDING	$6,826,399

this Agreement to delete this program from this Agreement and to return this sum to the Area. The Tribes agree to inform the Area Office of their election to return said sums to the Area within 30 days after receipt from the Area of the results of the upcoming 'deep look' survey of the Owyhee Hospital and the quarters, including the cost estimates associated with remedying whatever deficiencies are identified in that survey.

The Tribes Area Tribal Share and Headquarters Tribal Share do not include $68,999 and $1,920, respectively, in Sanitation Facilities Construction funds. As reflected in Appendix A hereto, these amounts represent a 'buy-back' of such services from the Indian Health Service. Owyhee Service Unit projects covered by the SFC program are as specified in Appendix C.

[4] As noted in footnote 3, the sum set forth herein reflects a revised active user-count for the Tribes of 1,418. The FY 1995 Agreement obligated the parties to continue to reconcile user population estimates. The reconciliation revealed that eligible active users were not counted due to their residence outside the service unit. The Service has agreed to include the additional 203 omitted users as noted in footnotes 2 and 3 of the 1995 AFA, as amended, and in the Text of Amendment No. 1. For Headquarters share calculations, an adjustment proportional to the count for the additional users shall be added to the FY 1996 AFA amount, based on the formula "[TSAS/1215] * 1418," with "TSA" meaning the Tribes' "tribal size adjustment" formula amount. (Originally the Headquarters tribal shares were allocated according to the formulae developed by Headquarters and left unchanged by the Phoenix Area Office.)

[5] Additional amounts to be included shall include, but not be limited to,

These amounts are subject to additions for Medicare, Medicaid, other reimbursements, and for new funds received during the term of this Agreement including amounts that have historically been distributed as non-recurring funds under Title I of the Indian Self-Determination and Education Assistance Act, as amended.

(b) Indirect costs shall be negotiated for this Annual Funding Agreement in compliance with section 106(d)(1) and 106(e) of the Indian Self-Determination and Education Assistance Act, as amended.

(c) An additional lump sum of funds in an amount to be negotiated pursuant to Article V, Section 12 of the Shoshone-Paiute Tribal Health Compact and in accordance with procedures in ISDM 92-2 shall be provided to the Tribes to defray start-up costs. The Tribes have included their requested start-up costs in the footnotes to the matrix set forth above. The final negotiation for start-up costs will be completed by October 1, 1995. The date of submission of the Tribes' request shall be considered to be the date the Tribes' initial request was received by the Phoenix Area Office. Neither the amount of start-up costs to be paid, nor the place in the ISD fund queue, shall be affected by any amendment of ISDM 92-2 that may occur.

(d) The amount available from Area for tribal shares reflects the transition plan agreed upon by the parties and does not reflect the full amount that will be available in future years.

any Fiscal Intermediary funds that may become available as a result of the IHS Director's upcoming decisions regarding distribution of this fund.

[6] The amount of contract support cost funding to support Area and Headquarters tribal share activities will be determined at a later date, and this Agreement shall be correspondingly modified to reflect such determination.

(e) The funds provided under this Agreement have been negotiated using certain residual and categorical line item assumptions. The parties have agreed to review the determination of IHS Headquarters residual resources and agree that the funds provided based upon residual may change in FY 1997.

(f) The parties agree that the Tribes have a right to receive a percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment Formula. The percentage of the fund to be made available for tribal distribution in FY 1996 shall be determined in mutual negotiation with the Tribes. The negotiations shall be concluded prior to August 30, 1995, and the Tribes' Tribal Size Adjustment share of the amount to be distributed shall be included in the Tribes' share of Headquarters funds under the Tribes' FY 96 Annual Funding Agreement, through addition to this Agreement. Any balance in the fund as of September 1, 1996 shall be paid to the Tribes under this Agreement on the basis of the Tribal Size Adjustment Formula.

(g) Once determined, the proportional share of the Tribes' mandatories, deferred services and any other funding for which the Tribes are eligible will be provided as an amendment to this Annual Funding Agreement.

Section 5—Method of Payment.

(a) Payment Schedule. Except as provided in subsections b, c, and d of this section, all funds identified in Section 4 of this Agreement shall be paid to the Tribes, in accordance with Article II, Section 4.a. of the Compact, payment to the Tribes to be made as follows:

> One annual payment in lump sum to be made annually in advance (on October 1, 1995) by check or wire transfer, subject to the apportionment process.

(b) Availability of Tribal Shares. The Indian Health Service shall provide 100 percent the negotiated amount of tribal shares from Headquarters, and 100 percent of tribal shares negotiated from the Phoenix Area Office. No less than 70% of the amount due from Headquarters tribal shares will be paid to the Tribes in their initial lump sum payment, with the remaining amount (if any) to be paid to the Tribes no later than July I, 1996.

(c) IPAs/MOAs. The Tribes have determined that they wish to carry out certain of their responsibilities to provide programs, activities, functions or services, (i.e. salaries of IPA/MOA employees) included in this Annual Funding Agreement utilizing services, personnel, supplies or other resources of the Federal Government, as permitted by law. Due to unique circumstances involving the historic funding pattern of the Owyhee Service Unit, including its historic financial deficit despite persistent vacancies in the Service Unit, the parties have developed a separate Memorandum of Agreement to address how to manage funds covering tribal utilization of federal personnel, services, supplies and the like.

(d) Periodic Payments: Payment of funds otherwise due the Tribes under this Agreement, which are added or identified after the initial payment is made, shall be made promptly upon request of the Tribes by check or wire transfer.

(e) Interest on late payments. Interest shall be paid on late payments as specified in the Prompt Payment Act to the extent not contrary to law.

Section 6—[Reserved]

Section 7—Contract Support Funding.

The Tribes shall be entitled to contract support funding on the same basis as tribes and tribal organizations who contract under Title I of the Act. In determining the amount of

contract support funds to be provided under the Compact, the following procedures shall apply.

(a) Existing Contract Base. The Tribes' program base established in this Agreement will be included in the base in successor AFAs (absent the addition of new programs to this Agreement as provided in subparagraph (b) hereof), and the Tribes will be entitled to share appropriate mandatory and other inflation increases in common with all other tribes. Indirect contract support funds, based on the application of the Tribes' negotiated indirect cost rate, shall be added to the Tribes' program base for FY 1996 and may be increased in subsequent years if required by the Tribes' negotiated indirect cost rate.

(b) New program funds other than Area and Headquarters tribal shares. To the extent not inconsistent with sections 106(a) and (b) of the Indian Self-Determination Act, and unless superseded, the provisions of the Indian Health Service's ISDM 92-2 shall be applied to additional program funding for activities assumed by the Tribes as an expansion of the existing operations described in subparagraph (a) above. Recurring direct and indirect contract support shall be added to the Tribes' funding base for FY 1996 and subsequent years. This paragraph shall apply to the programs specified in Paragraphs 3-B and 3-C of this Agreement.

In determine the Tribes' entitlement to contact support costs, the Tribes shall negotiate directly with the Office of Tribal Activities (OTA) and no decision by that office shall be made until such negotiations have occurred. The Office of Tribal Activities shall notify the Tribes in detail and in writing of its determinations, together with detailed reasons explaining any disapproval of the Tribes' request and the Tribes' appeal rights from such determinations.

(c) Area and Headquarters funds. The Tribes will be entitled to contract support funds to the full extent specified in section 106(a)(2) of the Act and related provisions.

Section 8—Sufficiency of Service Unit Funding. The Phoenix Area Office has expressed the view that the base service unit funding included herein for operation of the Owyhee Hospital is sufficient to operate the hospital within budget at full staffing of professional and managerial staff. The Tribes have expressed skepticism based upon their own professional assessments.

The Tribes have requested that if, as a result of full recruitment at the Owyhee Hospital in FY 1996, or as a result of unforeseen circumstances, the Tribes experience a shortfall, the Indian Health Service should agree to fund such shortfall, provided that the Tribes have first furnished the Service with a full accounting of the circumstances giving rise to the shortfall and have satisfied the Service that the Tribes have managed their available funds prudently. The Indian Health Service has declined to make this agreement in advance, but has agreed to reserve the authority to address such a contingency on an emergency basis as the circumstances warrant.

For the record, the Phoenix Area Office takes the position that the appropriation process nationally funds only approximately 60% to 70% of need. Further, the Phoenix Area Office notes that over the past two years it has increased the recurring base funding to the Owyhee Service Unit. It is the position of the Phoenix Area Office that the Owyhee Service Unit does not experience funding shortfalls different in kind from that experienced by other service units.

Section 9—Adjustments.

(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to adjustment due to Congressional

action in appropriations Acts or other laws affecting availability of funds to the Indian Health Service and the Department of Health and Human Services. Upon enactment of any such Act or law, the amount of funding provided to the Tribes in this Agreement shall be adjusted as necessary, after the Tribes have been notified of such pending action and subject to any rights which the Tribes may have under this Agreement, the Compact, or the law.

(b) Financial Adjustments to Annual Funding Agreement during Review Period. It is recognized that since self-governance is a demonstration project, there may be errors in calculations, or mistakes in defining the tribal population, number of tribes, recurring base, or definitions of other variables which determine tribal shares which may need to be renegotiated during the review period under Section 303(a)(9) of the Indian Self-Determination and Education Assistance Act, as amended. Both parties agree to take prompt action to correct such errors as they are identified.

(c) Recalculation of Area Tribal Shares Based Upon Residual Amounts. The parties note that the Area tribal share calculation set forth herein has been based upon an interim and renegotiable Area residual level of 46 FTEs. The parties agree that during the first six months of FY 1996 the parties will undertake and complete (with the active participation of other interested Phoenix Area Tribes) a study of the Area residual function, with the study limited to those inherently federal functions that can only be performed by federal officials of the Indian Health Service (hereafter the "Phoenix Area FY 1996 Residual Study").

The parties agree that the amount of the Tribes' Area tribal share for FY 1996 shall, at the Tribes' request, be subject to renegotiation at the residual levels determined in the Phoenix Area FY 1996 Residual Study. In the event of such renegotiation, any additional tribal shares payable to the Tribes shall

be paid on or before May 1, 1996, and no interest shall be due on such additional sum for any period preceding that date.

Section 10—Program Rules.

The Tribes will make every effort to carry out the health programs, activities, functions, and services in this Agreement in compliance only with:

JCAHO Standards for Hospitals and Ambulatory Care Facilities, as applicable.

Section 10A—Property.

The Tribes shall retain title to all property purchased with funds provided under this Annual Funding Agreement. The Indian Health Service shall transfer to the Tribes title to all property (other than realty) used in connection with the programs identified in section 3 of this Agreement, and within 30 days from the date of execution of this Amendment No. 1 the Indian Health Service shall provide the Tribes with a complete and inventoried listing of all such transferred property. All property referred to in this paragraph shall hereafter be replaced by the Indian Health Service on the same basis as if title to such property were in the Indian Health Service.

Section 11—[Reserved]

Section 12—Headquarters and Area Responsibilities.

Unless funds are specifically provided from Headquarters or Area, Headquarters and Area retain all programs, activities, functions, and services and the Tribes, their members, and their service unit population will not be denied access to, or services from, Headquarters or Area.

Section 13—Access to Training and Technical Assistance.

To the extent funds are retained by the Indian Health Service, the Tribes shall have access to training, continuing education, and technical assistance in the same manner as if

the Tribes' programs had remained under federal administration and to the same extent the Tribes would have received such services if they were not participating in the Self-Governance Demonstration Project.

Section 14—Amendment or Modification of this Agreement.

(a) Form of Amendments. Except as otherwise provided by this Agreement, the Compact, or by law, any modifications to this Agreement shall be in the form of a written amendment and shall require written consent of the Tribes and the United States.

(b) Services from IHS. Should the Tribes determine that they wish the Indian Health Service to provide programs, activities, functions or services included in this Annual Funding Agreement for which funding has been identified but not provided, the parties shall negotiate an amendment to the Annual Funding Agreement to reflect the transfer of responsibilities from the Tribes back to the Indian Health Service and the pro-rata share of funding for that program, activity, function or service shall be retained by the Indian Health Service.

(c) Due to Addition of New Program. Should the Tribes determine that they wish to provide a program, activity, function or service of the Indian Health Service not included in this Annual Funding Agreement, the Tribes shall submit a proposal to the Indian Health Service to provide such program, activity, function, or service. Such proposals shall be reviewed by the Indian Health Service in accordance with the contract proposal review process and timelines set forth in Section 102 of the Indian Self-Determination and Education Assistance Act, and the funding provisions of sections 106(a)(1) and 106(a)(2) of Title I and of Title III, as amended. Proposals submitted pursuant to this section shall be treated as a request for amendment to the Annual Funding

Agreement and, once approved by the Indian Health Service, shall be added to the Agreement by amendment.

(d) Due to Availability of Additional Funding. The Tribes shall be eligible for any increases in funding or funding for new programs to which they would have been eligible had they been administering programs under a self-determination contract, rather than under the Shoshone-Paiute Tribal Health Compact and this Agreement, and for any other funds that are not restricted by appropriations language for which any tribe or tribal organizations may be eligible, including any new funds appropriated for Indian, Health Service Headquarters and funds passed to the Phoenix Area as recurring or non-recurring funds, and this Agreement shall be amended to provide for timely payment of such new funds to the Tribes.

Section 15—Severability.

(a) Except as provided in this section, this Agreement shall not be considered invalid, void or voidable if any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Agreement as invalid, void, voidable, in accordance with the provisions of the Compact.

(c) In the event that the parties decide to treat the Agreement as invalid, void or voidable, under subsection (b) of this section, the parties will seek agreement to amend, revise, or delete any such invalid, unlawful or unenforceable sections or provision, in accordance with the provisions of the Compact.

Section 16—Effective Date and Duration.

This Annual Funding Agreement shall become effective on January 1, 1995, and remain in effect through the remainder

of the 1995 federal Fiscal Year or until a successor agreement is negotiated and becomes effective pursuant to Article II, Section 12 of the Compact.

United States of America
Secretary of the Department of
Health and Human Services

/s/ [illegible]
Director, Indian Health Service

Date: JUNE 30, 1995

Duck Valley Shoshone-Paiute Tribes

/s/ Renee Rose
RENEE ROSE, Vice Chairperson for
By: Lindsey Manning, Tribal Chairman

Date:6/28/95

IHS FOOTNOTE 06/30/95—This agreement is contingent upon an internal review, during the 90 day review period, for consistency with Federal law and accuracy of calculations. Issues identified will be shared with the tribe(s) for further negotiations. Therefore, these issues should be considered unresolved, e.g., funding of HQ tribal shares, title I provisions, contract support costs, and MOA/IPA agreements, etc. The Director in agreeing to sign the AFA will identify the issues and continue to negotiate with the tribe for resolution within the 90 day review period.

[See JA Vol. II, PART 1 for attached
Appendix A (funding tables)]

Amendment No. 1

Annual Funding Agreement

between the

DUCK VALLEY SHOSHONE-PAIUTE TRIBES

and the Secretary of the Department of Health
and Human Services of the

UNITED STATES OF AMERICA

October 1, 1995, as amended March 6, 1996

This Amendment No. 1 amends and supersedes any inconsistent provision of the original Annual Funding Agreement between the parties dated October 1, 1995, (hereafter "AFA") and in part sets forth updated funding figures for Fiscal Year 1996.

The parties hereby agree as follows.

1. In AFA footnote no. 1 the phrase "the sum of $1,573,094 in requested recurring direct and indirect contract support funds" is hereby stricken and replaced with the following:

> the sum of $1,667,566 in approved and agreed recurring direct ($494,517) and non-recurring indirect ($1,173,149) contract support funds (subject to further adjustment up or down according to the Tribes' indirect cost rate) associated with both those programs. As provided in the Compact, the amounts approved for direct and indirect contract support shall be paid subject only to the availability of appropriations.

2. In AFA footnote no. 2 the first sentence is stricken and replaced with the following:

> Of the specified amount, $367,400 has been approved and agreed as non-recurring direct start-up or preaward contract support costs in connection with the programs described in section 3-A (hospital operated portion) and 3-B of this Agreement. As provided in the Compact, this amount shall be paid subject only to the availability of appropriations.

3. The amount set forth in text at AFA footnote no. 1 shall be reduced to reflect that indirect contract support cost funding is nonrecurring to the Tribes. The total recurring funding shall read "$5,240,860."

4. The amount set forth in text at AFA footnote no. 2 shall read "$367,400" plus indirect contract support.

This Amendment No. 1 shall be subject to further adjustment as set forth in the AFA. This amendment includes a one-page document entitled IHS Form A (revised Feb 29, 1996), and supercedes Appendix A to the AFA.

This Amendment No. 1 shall be effective as of October 1, 1995 insofar as it substitutes corrected figures for those figures set forth in the AFA.

United States of America
Secretary of the Department of
Health and Human Services

By:_____
Director, Indian Health Service
Date: _____
Duck Valley Shoshone-Paiute Tribes

/s/ James Paiva,
JAMES PAIVA, Tribal Chairman
Date: May 22 1996

Annual Funding Agreement
between the
DUCK VALLEY SHOSHONE-PAIUTE TRIBES
and the
Secretary of the Department of Health and Human Services
of the
UNITED STATES OF AMERICA
October 1, 1996

This Annual Funding Agreement is entered into by and between the Shoshone-Paiute Tribes and the Secretary of the Department of Health and Human Services of the United States of America.

Section 1—Obligations of the IHS.

This Annual Funding Agreement ("Agreement" or "AFA") obligates the Indian Health Service (IHS) to provide funding and services identified herein in Fiscal Year 1997 and as provided in the Shoshone-Paiute Tribal Health Compact ("Compact"), as amended, between the Duck Valley Shoshone Paiute Tribes and the United States.

Without intending any limitation, the Phoenix Area Office will also continue to provide, but will not be limited to providing, without charge to the Tribes and upon request, technical assistance to the extent doing so does not diminish services to other tribes. The Phoenix Area Office also will continue to provide services, which will include, but not be limited to:

A. Purchasing activities under GSA contracts.

B. Region IX Legal Consultation.

C. Access to the Phoenix Indian Medical Center and related facilities, specialty or other clinics, and programs.

D. Others to be added.

Further, the Phoenix Area Office shall also provide the following services not funded under this Annual Funding Agreement:

1. Training and related travel.

   The parties agree that the Tribes shall remain eligible to participate in training activities offered or funded by the Indian Health Service on an equal basis with other programs operated by the Indian Health Service. The Indian Health Service (including each Phoenix Area program director) shall provide reasonable notice to the Tribes of training opportunities available for positions covered by this AFA. Tribal training requests shall be routed through the Area program directors or the Area Director, as appropriate.

2. Quarters.

   The Tribes shall receive all quarters rents from quarters occupants (including direct payments from IPAS and MOAs), and shall provide the Phoenix Area with an annual report of all quarters collections. Reimbursements received by the Owyhee Service Unit in the form of rents on government quarters for persons carrying out this AFA shall be retained at the service unit for purposes of maintenance and improvement of the quarters. Such retention shall not affect the eligibility of the quarters for maintenance and improvement funding, nor shall it affect the eligibility of the quarters to participate in the Area quarters pool, provided that the Tribes have not previously received their shares of the Area maintenance and improvement funds or Area quarters pool funds. The parties agree to cooperate in securing payments of arrearages from federal IPA/MOA

employees occupying the Owyhee quarters, subject to such terms as the parties may negotiate.

The parties agree that the maintenance and improvement and similar projects (with estimated completion dates) listed on Appendix B to the parties' FY 1996 AFA (together with the Owyhee Hospital diesel fuel cleanup project and parking lot restoration project) shall be completed by the Phoenix Area Office, without charge to the Owyhee Service Unit, and that every effort shall be made by the Area to complete such projects prior to October 31, 1996.

3. Vehicles.

   The Tribes shall have access to the GSA motor vehicle pool on the same basis as did the Service Unit prior to tribal operation of the Service Unit subject either to the Indian Health Service agreement with the General Services Administration (GSA) or a separate tribal agreement with the GSA.

4. Federal Sources of Services and Supply.

   The Indian Health Service shall assist the Tribes in accessing federal sources of supply, including air carriers.

7. Space.

   In the 1996 AFA the parties agreed as follows:

   The Indian Health Service shall, without cost to the Tribes, remodel the basement space in the Owyhee Community Hospital for use by persons carrying out Paragraph 3-A of this Agreement and the Compact. The remodeling project shall proceed as specified in Appendix D to this Agreement. In 1997 the parties are exploring the availability of additional contract support costs to fund this effort.

8. Phones.

The Tribes shall, without charge to the Tribes, retain access to FTS- 2000 lines to carry out the Compact.

10. Property.

A use agreement shall be negotiated and executed by the parties on or before October 31,1996 to cover use by the Tribes of all federal realty associated with the programs covered by Section 3 of this Agreement.

Section 2—Obligations of the Tribes.

The Agreement obligates the Tribes to be responsible for the health programs, activities, functions, and services identified in Section 3, utilizing the resources transferred under this Agreement. This Agreement further authorizes the Tribes to consolidate and redesign programs, activities, functions, and services as provided in the Indian Self-Determination and Education Assistance Act, as amended, and the Compact.

Section 3—Tribal Programs and Budget.

The Tribes agree to be responsible for the health programs, functions, activities, and services identified below in accordance with the Compact and this Agreement, subject to the Tribes' right to redesign such programs as provided in the Act. For the purposes of this Agreement, the Tribes General Budget categories consolidate related health programs, activities, functions and services as listed below. Services are provided on the Duck Valley Reservation of Nevada and Idaho. Programs, activities, functions and services will be operated in accordance with applicable federal laws governing eligibility for direct care services and contract health care services.

The applicability of the Federal Tort Claims Act shall be pursuant to Article V, Section 3 of the Shoshone-Paiute Tribal Health Compact, to section 102(d) of the Act, as amended, and to section 314 of Pub. L. No. 101-512, as amended.

A. Community Oriented Primary Care Program

The Community Oriented Primary Care Program will promote the wellness of tribal members through direct services, coordination of outside services, health promotion and disease prevention, and community education and training. Essential elements of the Community Oriented Primary Care Program are:

1. Inpatient Hospital Services

Inpatient hospital services will be provided in the 15 bed Owyhee Community Hospital facility. Comprehensive general medical services will include doctor care, room and board, general nursing care, diagnostic tests, drugs and medical supplies.

2. Outpatient Clinical Services

The outpatient clinic will provide a comprehensive range of services including diagnosis and treatment of illness or injury; preventive care, including well baby care; periodic check-ups and routine immunizations; laboratory tests and radiological examinations. The outpatient clinic will be in operation daily Monday through Friday (holidays excluded). Primary care shall be provided by physicians and physician extenders following acceptable written protocols. They shall be supported in their efforts by registered nurses.

3. Emergency Medical Services

Emergency medical services will be provided 24 hours a day at the Owyhee Community Hospital facility. Ambulance services shall be provided 24 hours a day. Ambulance services shall be staffed by level 1 and level 2 qualified Emergency Medical Technician personnel.

4. Pharmacy Services

Prescription drugs prescribed by a Tribal Health Program doctor or referral doctor or any licensed dentist will be provided by the pharmacy at the Owyhee Community Hospital. Pharmaceuticals will be provided by a licensed registered pharmacist in accordance with State and Federal laws.

5. Medical Records

A system will be in operation which provides for the collection, processing, maintenance, prompt retrieval, and distribution of patient records according to established policies and procedures. The confidentiality, security, and safety of patient records will be ensured.

6. Medical Laboratory

Medical laboratory services will be provided under the supervision of a qualified laboratory technologist with consultation from a local pathologist. Medical laboratory services will be available 24 hours a day.

7. Radiology Services

Radiology services will be provided under the supervision of the clinical director with consultation from a board certified radiologist. Appropriate diagnostic radiology services will be immediately available 24 hours a day.

8. Dental Services

A comprehensive range of dental services will be provided at the dental clinic in the Owyhee Community Hospital. Services will include diagnostic services and preventive care; restorative services; oral surgery; periodontics; endodontics; and prosthetic devices.

9. Mental Health and Social Services

Mental Health and Social Services will include a full range of psychological and social services for both inpatients and outpatients, including counseling, psycho-diagnosis, and the application of psychological principles, theories, methods and techniques. Psychological tests will be administered and interpreted. Medical problems will be referred to appropriate medical staff. Social services shall be provided in hospital, community and individual settings.

10. Public Health Nursing

Public Health Nursing Services will provide a variety of clinical and field nursing services to patients/clients and their families including screening, evaluation, counseling, discharge planning, consultation, referral to community resources and assisting clients in the optimum utilization of needed Federal, State, local and private community resources.

11. Health Education

The Health Education component will provide health promotion and disease prevention education and teach physical and mental health concepts, effective living skills and wellness in the family. Assessment of community health care needs and evaluation of community resources will be performed in collaboration with other program components.

12. Community Health Representative Services

Community Health Representative Services will include health education presentations in community and individual home settings; client assistance in a variety of clinical settings such as maternal and child health, elderly, and diabetic clinics; client transportation; home health services and general promotion of wellness within the community.

13. Alcohol and Substance Abuse Services

Alcohol and Substance Abuse Services will promote the efficient practice and coordination of substance abuse services within the Community Oriented Primary Care Program. A comprehensive range of services will be provided to clients and families including screening, evaluation, group and individual counseling, referral to community resources and assisting clients in utilizing other resources.

B. Managed Care Program (Contract Health Services)

The Shoshone-Paiute Tribes will administer a Managed Care Program in order to provide comprehensive health services for members and descendants of members of the Tribes and other Indians determined by the Tribes to meet Federal eligibility criteria for the program. The Managed Care Program will initially adopt the Indian Health Service CHS Standard Operating Procedures, including the Dental Program Schedule of Services. The Tribes retain the right to adapt and modify the IHS procedures to meet their own circumstances and priorities, to the extent that such modifications do not impinge upon the quality of health service delivered under the program. The Managed Care Program will develop and implement its own Standard Operating Procedures. The Shoshone-Paiute Tribes will provide services consistent with those authorized in the IHS CHS Standard Operating Procedure. The delivery of these services will be limited only by the availability of financial resources. The Tribes also retain the right to modify the Indian Health Service Medical Priorities Guidelines to best address the health priorities and needs of the Indian people served by the Managed Care Program.

C. Program Management and Administration

Overall policy and responsibilities shall reside with the Shoshone-Paiute Tribes and its designated Tribal Health Organization. The Tribal Health Program Director will serve as the focal point for coordination of all health services programs, functions, activities, and services. The Director shall be guided by the policies set down by the Tribe and its designated Tribal Health Organization. The Director shall be responsible for the daily operation of all programs and facilities. Authority for health care services and operational decisions shall generally be delegated to department heads. Authority for administrative decisions and operations shall be delegated as deemed necessary for effective and efficient operation of the organization. The Director shall be assisted and supported by appropriate administrative specialists including hospital administrator, budget officer, patient business office manager, and information systems manager. The Tribe and/or its designated Tribal Health Organization shall provide general administrative support services including financial accounting and bookkeeping, payroll, insurance and risk management, internal control and audit, property and supply management, and human resource services.

D. Other Programs and Services Funded:

1. Any new health care program funded during FY 1997 including but not limited to programs identified in the Indian Health Care Improvement Act, as amended.

2. Any new health care program resulting from the reallocation of funds and redesign of programs during FY 1997 in accordance with the terms of the Compact.

3. Any new programs or services established by Federal or State legislation which the Shoshone-Paiute Tribes determine they accept. This would include any products of health care reform.

Section 4—Amounts Available in Fiscal Year 1997

(a) The following amounts are available to the Tribes pursuant to their Compact and to Title III of the Indian Self-Determination and Education Assistance Act, as amended, and are subject to reductions only in accordance with Section 106 of that Act during the term of this Annual Funding Agreement ("TBD" means "To Be Determined"):

	Annual Funding
Recurring base: Inclusive of all recurring funding, including recurring contract support funds.[1]	$6,561,805

[1] The specified amount includes the sum of $4,714,611 for operation of the Owyhee Hospital and all related programs including community health programs (based on FY 1996 figures) funded at the Service- Unit level, and the sum of $1,847,196, in recurring direct and indirect contract support cost funds associated with those programs. Of this last sum, the Tribes take the position that the sum of $1,667,666 in recurring direct ($494,517) and indirect ($1,173,149) contract support should have also been paid to the Tribes in fiscal year 1996; while the Indian Health Service disagrees that it had any legal obligation to pay such sums in fiscal year 1996, nothing herein is intended to affect in any manner the Tribes' claim in this respect.

The amount set forth will be adjusted within three months of a final appropriation appropriating funds payable under this AFA, as required by section 106(a)(l) of the Act, and such increased amounts shall be paid in a lump sum within that time.

	Annual Funding
Nonrecurring funding: Inclusive of nonrecurring contract support funds.[2]	$435,762
OTHER:	
Subtotal:	TBD
	$6,997,567
Area "tribal" share to include funding identified from Area Office and identified in Form A to this Agreement.[3]	$93,109

[2] Of the specified amount, $367,400 represents one-time start-up or preaward contract support funds in connection with the Managed Care Program described in section 3-B of this Agreement, and the hospital-related portion of the Comprehensive Program described in section 3-A of this Agreement. The Tribes take the position that the sum of $367,400 in nonrecurring start-up contract support should have been paid to the Tribes in fiscal year 1996; while the Indian Health Service disagrees that it had any legal obligation to pay such sums in fiscal year 1996, nothing herein is intended to affect in any manner the Tribes' claim in this respect.

Other non-recurring funds will not be specifically identified in this Agreement, but will be provided to the Tribes in the future to the same extent as they would have been provided to the Owynee Service Unit in the absence of this Compact.

The sums included herein for special pay and permanent change of station ($68,362) shall be subject to adjustment in the event the Tribes are paid direct contract support cost funds for these functions in fiscal year 1997.

[3] The Area tribal share was determined using a 30/70 (number of tribes/number of active users) formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount. The parties agree to adjust the calculation of Area tribal shares based upon the final FY 1997 congressional appropriation amounts, such adjustment to be finalized and paid no later than January 1, 1997.

Phoenix Area tribal shares for all Area tribal compactors are as set forth in the *Phoenix Area Office Self-Governance Summary—1996 Negotiations* (5/ /96 printout) and the *Source of AFA Area Office Resources (Estimated), FY 1997 Duck Valley Tribal Negotiations, Phoenix Area Indian Health Service* (5/-/96 printout), subject to further

	Annual Funding
Headquarters—Tribal share: "tribal share adjustment" formula including all funds identified in Form A, and such additional funds which the IHS may make available on a TSA basis during the year based on the	$51,390

amendment as set forth here and in section 9(c) of this Agreement. The parties agree that the formulae applied to calculate the Tribes' share of funds shall be applied equally to all Phoenix Area compactors. In the event such formulae are not so applied, this Agreement shall be subject to renegotiation.

The amount set forth herein includes the Tribes' share of Area M&I Large Project Pool Funds. The Tribes reserve the right during the term of this Agreement to delete this program from this Agreement to the extent said funds have not yet been paid to the Tribes, and for the Indian Health Service to retain such funds.

The Tribes' Area Tribal Share and Headquarters Tribal Share specified here do not include the retained Sums referenced in section 6 of the Annual Funding Agreement.

The Tribes' share of the "fiscal intermediary" (FI) activity is based on data which the Tribes believe inaccurately reflects the Tribes' level of use of the FI at the time the Tribes took over operation of the Owyhee Community Health Facility on October 1, 1995. The parties have agreed to research the relevant data, and the sum set forth in Appendix A for FI shall be subject to adjustment if the current data is determined to be inaccurate. In the event the Tribes are dissatisfied with the results of the research, the matter shall be presented to the IHS Ratifier for final determination. The sum set forth herein shall be adjusted to reflect the results of any adjustments made by the parties or the IHS Ratifier.

The amount set forth herein shall be amended to reflect the parties' final agreement regarding the residual level in fiscal year 1997.

[4] The sums set forth herein reflect a revised active user count for the Tribes of 1,406. The Tribes' FY 1995 Annual Funding Agreement obligated the parties to continue to reconcile user population estimates. The reconciliation revealed that certain eligible active users were not counted due to their residence outside the service unit. The Service has agreed to include the additional users as noted in footnotes 2 and 3 of the 1995 AFA, as amended, and in the text of Amendment No. 1 to the 1995

programs accepted for this allocation in Form A.[4]	
Headquarters—Tribal share: "program formula pool"—to include all funds identified in Form A, and such additional funds which the IHS may make available on a program formula basis during the year based on the programs accepted for this allocation in Form A.	$69,078
ISDM support on the "tribal shares" identified above including funding from both Headquarters and Area Office as identified in Form A.	$80,782
Subtotal - Tribal Shares	$294,359
TOTAL COMPACT FUNDING	$7,291,926

These amounts are subject to additions for Medicare, Medicaid, other reimbursements, and for new funds received during the term of this Agreement including amounts that have historically been distributed as non-recurring funds under Title I of the Indian Self-Determination and Education Assistance Act, as amended.

(b) Indirect costs shall be negotiated for this Annual Funding Agreement in compliance with section 106(d)(l) and 106(e) of the Indian Self-Determination and Education Assistance Act, as amended, and the amounts set forth in the preceding shall be adjusted accordingly.

AFA. The parties have agreed to do so through a redesignation of the Tribes' CHSDA boundaries to include certain adjacent counties, a matter which is in process at the time of execution of this AFA.

The Tribes' share of Headquarters equipment replacement funds shall be subject to renegotiation based upon the Tribes' audit of the square footage and workload data used in the formula for distribution of those funds.

(c) The parties agree that the Tribes have a right to receive a percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment Formula to the extent funds remain in this account as of September 1, 1997. Any balance in the fund as of September 1, 1997 shall be paid to the Tribes under this Agreement on the basis of the Tribal Size Adjustment Formula.[5]

(d) Once determined, the proportional share of the Tribes' mandatories, deferred services and any other funding for which the Tribes are eligible will be provided as an amendment to this Annual Funding Agreement.

Section 5—Method of Payment.

(a) Payment Schedule. Except as provided in subsections b, c, and d of this section, all funds identified in Section 4 of this Agreement shall be paid to the Tribes, in accordance with Article II, Section 4.a. of the Compact, payment to the Tribes to be made as follows:

> One annual payment in lump sum to be made by wire transfer, within 20 working days of apportionment.[6]

(b) Availability of Headquarters Tribal Shares. The Indian Health Service shall provide 100 percent the negotiated amount of tribal shares from Headquarters, and 100 percent of tribal shares negotiated from the Phoenix Area Office. No

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[5] The Tribes continue to protest the refusal of the Indian Health Service to distribute the entire Management Initiative Fund using the Tribal Size Adjustment formula.

[6] It is the Tribes' position that payment should be made to the Tribes within ten days of apportionment. The Tribes believe that time is of the essence in this respect, and note that while the Indian Health Service is able to pay its employees and make other expenditures immediately upon commencement of the new fiscal year, prior to full apportionment, the Tribes are required to await receipt of their lump sum payment before they have access to new fiscal year funds from which to pay tribal health employees and to incur expenditures in the new fiscal year.

less than 90% of the amount due for Headquarters tribal shares will be paid to the Tribes in their initial lump sum payment, with the remaining amount (if any) to be paid to the Tribes within 90 days of apportionment.

(c) IPAs/MOAs. The Tribes have determined that they wish to carry out certain of their responsibilities to provide programs, activities, functions or services, (i.e. salaries of IPA/MOA employees) included in this Annual Funding Agreement utilizing services, personnel, supplies or other resources of the Federal Government, as permitted by law. Due to unique circumstances involving the historic funding pattern of the Owyhee Service Unit, including its historic financial deficit despite persistent vacancies in the Service Unit, the parties in fiscal year 1996 developed a separate Memorandum of Agreement to address how to manage funds covering tribal utilization of federal personnel, services, supplies and the like. The parties shall continue to implement this section of the AFA pursuant to the terms of the Memorandum of Agreement, subject to any amendments thereto to which the parties may agree, provided that, prior to the distribution of any FY 1997 IPA/MOA funds to the Tribes the Indian Health Service has received full reimbursement for all FY 1996 IPA/MOA costs in accordance with the Memorandum of Agreement. In addition, the parties agree that, by October 31, 1996, the payment, invoicing, reimbursement and reconciliation process will be revised in a manner acceptable to the parties, and any such revisions shall be memorialized as an amendment to the Memorandum of Agreement.

(d) Periodic Payments. Payment of funds otherwise due the Tribes under this Agreement, which are added or identified after the initial payment is made, shall be made promptly upon request of the Tribes by check or wire transfer.

(e) Interest on late payments. Interest shall be paid on late payments as specified in the Prompt Payment Act to the extent not contrary to law.

Section 6—Retained Shares

The parties agree that the Indian Health Service shall retain the Tribes' shares for the following programs, services, functions or activities:

(a) portions of the Phoenix Area Human Resources and Financial Management offices relating to the employment of individuals covered by IPAS or MOA's;

(b) IRM and RPMS related functions; and

(c) sanitation facilities,

all as set forth in the attached Appendix A.

Section 7—Contract Support Funding.

The Tribes shall be entitled to contract support funding on the same basis as tribes and tribal organizations who contract under Title I of the Act, pursuant to the provisions of section 106(a)(2) of the Act. The Tribes will be entitled to share appropriate mandatory and other inflation increases in common with all other tribes, such amounts, if any, to be added to the Tribes' program base (which does not include contract support) established in this Agreement. Indirect contract support funds, based on the application of the Tribes' negotiated indirect cost rate to the base, shall be added to the Tribes' program base for FY 1997 and may be increased in subsequent years if required by the Tribes' negotiated indirect cost rate. To this amount shall be added all direct contract support funds to which the Tribes are entitled under section 106(a) of the Act. The Tribes will be entitled to contract support funds on Area and Headquarters tribal shares to the full extent specified in section 106(a)(2) of the Act and related provisions.

Section 8—Sufficiency of Service Unit Funding. The Phoenix Area Office has expressed the view that the base service unit funding included herein for operation of the Owyhee Hospital is sufficient to operate the hospital within

budget at full staffing of professional and managerial staff. The Tribes have expressed skepticism based upon their own professional assessments.

The Tribes have requested that if, as a result of full recruitment at the Owyhee Hospital in FY 1997, or as a result of unforeseen circumstances, the Tribes experience a shortfall, the Indian Health Service should agree to fund such shortfall, provided that the Tribes have first furnished the Service with a full accounting of the circumstances giving rise to the shortfall and have satisfied the Service that the Tribes have managed their available funds prudently. The Indian Health Service has declined to make this agreement in advance, but has agreed to reserve the authority to address such a contingency on an emergency basis as the circumstances warrant.

For the record, the Phoenix Area Office takes the position that the appropriation process nationally funds only approximately 60% to 70% of need. Further, the Phoenix Area Office notes that in FY 1994 and FY 1995 it increased the recurring base funding to the Owyhee Service Unit. It is the position of the Phoenix Area Office that the Owyhee Service Unit does not experience funding shortfalls different in kind from that experienced by other service units.

Section 9—Adjustments.

(a) Due to Congressional Actions. The parties to this Agreement recognize that the total amount of the funding in this Agreement is subject to the availability of appropriations.

(b) Financial Adjustments to Annual Funding Agreement during Review Period. It is recognized that since self-governance is a demonstration project, there may be errors in calculations, or mistakes in defining the tribal population, number of tribes, recurring base, or definitions of other variables which determine tribal shares which may need to be renegotiated during the review period under Section 303(a)(9)

of the Indian Self-Determination and Education Assistance Act, as amended. Both parties agree to take prompt action to correct such errors as they are identified.

Section 10—Program Rules.

The Tribes will make every effort to carry out the health programs, activities, functions, and services in this Agreement in compliance with:

JCAHO Standards for Hospitals and Ambulatory Care Facilities, as applicable.

Section 11—Property.

The Tribes shall retain title to all property purchased with funds provided under this Annual Funding Agreement. As provided in section 105(f) of the Act, all property referred to in this paragraph, together with all property previously transferred to the Tribes by the Indian Health Service, shall hereafter be replaced by the Indian Health Service on the same basis as if title to such property were in the Indian Health Service.

Section 12—Prior Annual Funding Agreements

Unless expressly stated otherwise, nothing in this Annual Funding Agreement shall be construed as relieving either party of any obligation undertaken under prior annual funding agreements between the parties.

Section 13—Headquarters and Area Responsibilities.

Unless funds are specifically provided from Headquarters or Area, Headquarters and Area retain all programs, activities, functions, and services, and the Tribes, their members, and their service unit population will not be denied access to, or services from, Headquarters or Area.

Section 14—Access to Programs, Services, Functions and Activities not Funded Under This AFA

To the extent funds are retained by the Indian Health Service, or are not currently being made available for distribution to the Tribes under this AFA, the Tribes shall retain access to all programs, services, functions and activities supported by such funds, in the same manner as if the Tribes' programs had remained under federal administration and to the same extent the Tribes would have received such services if they were not participating in the Self-Governance Demonstration Project.

Section 15—Amendment or Modification of this Agreement.

(a) Form of Amendments. Except as otherwise provided by this Agreement, the Compact, or by law, any modifications to this Agreement shall be in the form of a written amend ment and shall require written consent of the Tribes and the United States.

(b) Services from IHS. Should the Tribes determine that they wish the Indian Health Service to provide programs, activities, functions or services included in this Annual Funding Agreement for which funding has been identified but not yet paid, the parties shall negotiate an amendment to the Annual Funding Agreement to reflect the transfer of responsibilities from the Tribes back to the Indian Health Service and the pro-rata share of funding for that program, activity, function or service shall be retained by the Indian Health Service.

(c) Due to Addition of New Programs. Should the Tribes determine that they wish to provide a program, activity, function or service of the Indian Health Service not included in this Annual Funding Agreement, the Tribes shall submit a proposal to the Indian Health Service to provide such program, activity, function, or service. Such proposals shall be reviewed by the Indian Health Service in accordance with the contract proposal review process and timelines set forth in

Section 102 of the Indian Self-Determination and Education Assistance Act, and the funding provisions of section 106(a) of Title I and of Title III, as amended. Proposals submitted pursuant to this section shall be treated as a request for amendment to the Annual Funding Agreement and, once approved by the Indian Health Service, shall be added to the Agreement by amendment.

(d) Due to Availability of Additional Funding. The Tribes shall be eligible for any increases in funding or funding for new programs to which they would have been eligible had they been administering programs under a self-determination contract, rather than under the Shoshone-Paiute Tribal Health Compact and this Agreement, and for any other funds that are not restricted by appropriations language for which any tribe or tribal organizations may be eligible, including any new funds appropriated for Indian Health Service Headquarters and funds passed to the Phoenix Area as recurring or non-recurring funds, and this Agreement shall be amended to provide for timely payment of such new funds to the Tribes.

Section 16—Severability.

(a) Except as provided in this section, this Agreement shall not be considered invalid, void or voidable if any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction.

(b) If any section or provision of this Agreement is found to be invalid, unlawful or unenforceable by a court of competent jurisdiction, either party may, at its option, treat this Agreement as invalid, void, voidable, in accordance with the provisions of the Compact.

(c) In the event that the parties decide to treat the Agreement as invalid, void or voidable, under subsection (b) of this section, the parties will seek agreement to amend, revise, or delete any such invalid, unlawful or unenforceable sections or provision, in accordance with the provisions of the Compact.

Section 17—Effective Date and Duration.

This Annual Funding Agreement shall become effective on October 1, 1996, and remain in effect through the remainder of the 1997 federal fiscal year or until a successor agreement is negotiated and becomes effective pursuant to Article II, Section 12 of the Compact.

UNITED STATES OF AMERICA
SECRETARY OF THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES

By: /s/ [illegible]
Director, Indian Health Service

Date: July 2 1996

DUCK VAJLEY SHOSHONE PAIUTE TRIBES

By: /s/ James Paiva
JAMES PAIVA, Tribal Chairman
Date: 7-8-96

[See JA Vol. II, PART 1 for attached
Appendix A (funding tables)]

P.O. Box 219 Owyhee, Nevada 89832-0219 (702) 757-3211

September 20, 1996

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act claim for 1996 contract support costs

Dear Dr. Trujillo:

The Duck Valley Shoshone-Paiute Tribes hereby claim the right to immediate payment of $1,667,566 (ONE MILLION, SIX HUNDRED SIXTY-SIX THOUSAND, FIVE HUNDRED SIXTY-SIX DOLLARS) (subject to adjustment up or down according to the Tribes' indirect cost rate) due and owing to the Tribe under the provisions of Amendment No. 1 to the Fiscal Year 1996 Annual Funding Agreement for the Shoshone-Paiute Tribal Health Compact. This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* §§ 110(d) and 403(h) the Indian Self-Determination Act as amended.

As amended by Amendment No. 1, the 1996 Fiscal Year Annual Funding Agreement obligates the United States to

pay the Tribes the above-stated sum "in approved and agreed recurring direct ($494,517) and non-recurring indirect ($1,173,149) contract support funds" associated with the Tribes' operation of the Owyhee Hospital and all related programs and the Tribes' operation of the Managed Care Program. (See 1996 AFA, Footnote 1 (attached as Exhibit A), as amended by Amendment No. 1 paragraph 1 (attached as Exhibit B)).

To date, the Tribes have received none of this funding. We understand the funds have not been provided because the IHS believes it has no obligation to expend funds that were not expressly appropriated for this purpose, and because other tribes' claims have already exhausted the amount so appropriated. The Tribes believe the IHS is mistaken and that the amount must be paid to the Tribes from the IHS' general $2.3 billion FY 1996 appropriation.

This claim is supported by the Tribes' Fiscal Year 1996 Annual Funding Agreement (Exhibit A), and Amendment No. 1 to the Annual Funding Agreement (Exhibit B).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 3901 et. seq. and the Contract Disputes Act, 41 U.S.C. § 611, interest is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ James Paiva
JAMES PAIVA
Chairman

cc: Paula Williams, Director,
Office of Tribal Self-Governance

Lloyd Miller, Esq.

CERTIFICATION OF CONTRACT DISPUTES ACT CLAIM

I, James Paiva, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, hereby certify as follows on behalf of the Tribes:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Tribes believe the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Duck Valley Shoshone-Paiute Tribes.

DATED this 20th day of September, 1996.

Duck Valley Shoshone-Paiute Tribes

By /s/ James Paiva
JAMES PAIVA
Tribal Chairman

CERTIFICATE OF DELIVERY

I, Helen Hernandez, swear or affirm under penalty of perjury:

1. I am an employee of the Duck Valley Shoshone-Paiute Tribes.

2. I sent the originals of this document, together with the referenced Exhibits A and B, via Federal Express and certified U.S. mail to:

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

on the 26 day of September, 1996.

3. On the same date I also sent a copy of the same documents, via Federal Express and certified U.S. mail, to:

Paula Williams, Director
Office of Tribal Self-Governance
Indian Health Service
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Dated this 26 day of September, 1996.

/s/ Helen Hernandez
HELEN HERNANDEZ

Office of the Tribal Chairman
Shoshone-Paiute Tribes
of the Duck Valley Indian Reservation
P.O. Box 219, Owyhee, NV 89832

Telephone: 702/757-3211 Facsimile: 702/757-3212

September 23, 1997

VIA FEDERAL EXPRESS #4101619745
and CERTIFIED US MAIL #P243931542

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health & Human Services
5600 Fishers Lane, Room 6A-05
Rockville MD 20857

RE: Enclosed Contract Disputes Act Claim for 1997 Contract Support Costs

Dear Dr. Trujillo:

The Duck Valley on-Paiute Tnbes hereby claim the right to immediate payment of $4,714,611.00 (adjustment up for down according to the Tribes' indirect cost rate) due and owing to the Tribes under the provisions of the Fiscal Year 1997 Annual Funding Agreement for the Duck Valley Shoshone-Tribes Health Compact. This claim is submitted pursuant to the provisions of the contract Disputes Act, 41 U.S.C. § 601 *et seq*. §§ 110 (d) and 403 (h) the Indian Self-Determination Act as amended.

The 1997 Fiscal Year Annual Funding Agreement obligates the United States to pay the Tribes the above-stated sum "in direct and indirect contract support funds" associated with the Tribes' operation of the Owyhee Hospital and all related programs and the Tribes' operation of the Managed Care Program. (*See* 1997 AFA, Footnote 1 [attached as Exhibit A].) This sum includes $1,667,666.00 claimed by the Tribes under the Contract Disputes Act last year, for recurring direct

($494,517.00) and indirect ($1,173,149.00) contract support the Tribes claimed should have been paid in fiscal year 1996. By including that amount in this claim, the Tribes do not relinquish their prior claim for that amount and any interest and penalties that may be owed thereon under the Contract Disputes Act or the Prompt Payment Act.

To date, the Tribes have received none of this funding. We understand the funds have not been provided because the IHS believes it has no obligation to expend funds that were not expressly appropriated for this purpose, and because other tribes' claims have already exhausted the amount so appropriated. The Tribes believe the IHS is mistaken and that the amount must be paid to the Tribes from the IHS' general FY 1997 appropriation.

This claim supported by the Tribes' Fiscal Year 1997 Annual Funding Agreement (Exhibit A).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 611, interested is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ James Paiva
JAMES PAIVA
Tribal Chairman

hlh

Enclosures

XC: Paula Williams, Director, Office of Tribal Self-Governance
Don Davis, Phoenix Area Director
Thomas L. Austin, Tribal Consultant
Lloyd Miller, Tribal Attorney
Chrono

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, James Paiva, Chairman of the Shoshone-Paiute Tribes of the Duck Valley Indian Reservation, hereby certify as follows on behalf of the Tribes:

1. The above claim is made in good faith;
2. The supporting data are accurate and complete to the best of my knowledge and belief;
3. The amount requested accurately reflects the adjustment for which the Tribes believe the government is liable; and
4. I have been duly authorized to certify this claim on behalf of the Duck Valley Shoshone-Paiute Tribes.

Dated this 23rd day of September, 1997.

DUCK VALLEY SHOSHONE-PAIUTE TRIBES

By: /s/ James Paiva
JAMES PAIVA, Tribal Chairman

CERTIFICATE OF DELIVERY

I, Helen Hernandez, swear or affirm under penalty of perjury:

1. I am an employee of the Duck Valley Shoshone-Paiute Tribes.
2. I sent the originals of this document, together with the referenced Exhibit A, via Federal Express and certified U.S. mail to:

   Dr. Michael H. Trujillo, Director
   Indian Health Service
   Department of Health and Human Services
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

on the 23rd, day of September, 1997.

3. On the same date I also sent a copy of the same document and exhibit, via Federal Express and certified U.S. mail, to:

   Paula Williams, Director
   Office of Tribal Self-Governance
   Indian Health Service
   Parklawn Building
   5600 Fishers Lane, Room 5A-55
   Rockville, Maryland 20857

4. On the same date I sent a copy of the same document and exhibit via U.S. mail to:

   Don Davis
   Phoenix Area Director
   40 North Central Avenue Suite 600
   Phoenix, Arizona 85004-4424

Dated this 23rd day of September, 1997

_____
Helen Hernandez

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Case No. 99-092-S
(Class Action)

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

UNITED STATES; DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,

Defendants.

AFFIDAVIT OF BILL THORNE

BILL THORNE, being first duly sworn upon his oath, deposes and says:

1. I am an enrolled member of the Cherokee Nation and the Executive Director of the Cherokee Nation Health Service.

2. I have more than twenty years experience in the field of health management in both the public and private health care settings. Prior to working for the Cherokee Nation, I was employed by the Indian Health Service ("IHS") where I served as Administrator of the W.W. Hastings Hospital in Tahlequah, Oklahoma from 1978 to 1984.

3. I have been employed in my current position since April 1997. As Executive Director of the Cherokee Nation Health

Service, I am responsible for all aspects of the Nation's health care delivery operations. I am thoroughly familiar with the history and structure of the Cherokee Nation and have direct personal knowledge of the operations of the Cherokee Nation Health Service.

4. The Cherokee Nation has the second largest population of Native Americans in the United States. Tribal enrollment increased from 170,426 members in 1995 to 189,273 members in 1997, and tribal membership throughout the United States is currently estimated to be more than 200,000.

5. Approximately 91,000 Cherokee tribal members live within the Cherokee Tribal Jurisdictional Service Area ("TJSA"), a 7,000 square mile region in the northeast corner of Oklahoma. Fourteen counties, in whole or part, comprise the TJSA. In alphabetical order, they are Adair, Cherokee, Craig, Delaware, Mayes, McIntosh, Muskogee, Nowata, Ottawa, Rogers, Sequoyah, Tulsa, Wagoner and Washington counties.

6. Tahlequah is the capital of the Cherokee Nation, and it is located in Cherokee County in the southeastern section of the TJSA. The Cherokee Nation's principal government and business office complex is also located in Tahlequah, but tribal services are provided throughout the TJSA.

7. The Cherokee Nation is a federally recognized Indian tribe with a democratic, tripartite form of government operated under a tribal constitution. The Cherokee Nation's present Constitution was ratified in 1976, but the Nation's first modern constitutional government was established through a convention of tribal members in 1827. The Nation's Constitution provides for an executive branch, a legislative branch and a judicial branch of tribal government and relies on a modified "checks and balances" system to distribute power among these three government branches.

8. The Principal and Deputy Principal Chiefs are the Cherokee Nation's highest elected executive officers. The Chiefs and their appointed staff are responsible for performing the executive functions of tribal government and operating all tribal departments, services and programs, including the Cherokee Nation Health Service.

9. The Deputy Principal Chief is also the "President" of a fifteen-member Tribal Council and serves as its chair for official monthly meetings. The fifteen Tribal Council members are elected from nine voting districts. The Tribal Council is the legislative branch of tribal government. The Tribal Council has the power to pass tribal laws and ordinances, regulate tribal businesses and appropriate funds for use by the executive departments.

10. The Cherokee Nation executive branch is organized into four major divisions—Health Services, Education and Human Services, Community Development, and Financial and Asset Management.

11. The Principal Chief appoints Executive Directors for each major tribal department, including the Cherokee Nation Health Service. These directors and their staff are responsible for managing the departments and programs under their control in accordance with established tribal policies.

12. The Cherokee Nation has approximately 1,700 tribal employees, making it one of the largest employers in northeast Oklahoma. Of this number, the Cherokee Nation Health Service employs approximately 560 people, ranging from physicians, dentists, pharmacists, nurses and home health aides to administrators, billing clerks, secretaries and technicians.

13. Within the TJSA, there are six outpatient clinics, two hospitals, a mobile health unit and an EMS facility. The six outpatient clinics are located in Stilwell (Adair county), Sallisaw (Sequoyah county), Jay (Delaware county), Muskogee (Muskogee county)[1], Nowata (Nowata county) and Salina (Mayes county). The W.W. Hastings Indian Hospital is located in Tahlequah in Cherokee County, and the Claremore Indian Hospital is located in Rogers County. The EMS facility is located in Tahlequah in Cherokee County. These clinics, hospitals, and other facilities comprise the Cherokee Rural Health Network (CRHN), and they provide a wide range of basic health care services to more than 250,000 registered patients.

14. Starting in 1980, the Cherokee Nation gradually began to assume responsibility for operating IHS clinics and most IHS health care programs within the TJSA under the authority of the Indian Self-Determination and Education Assistance Act ("ISDEA"). The ISDEA allows the Cherokee Nation to assume operations of IHS programs serving Cherokee citizens and other eligible beneficiaries within the TJSA. The Cherokee Nation originally operated the programs under various self-determination contracts with the IHS. However, beginning in fiscal year 1994 (October 1, 1993), the Nation has operated these health programs under the terms of its Self-Governance Compact and annual funding agreements ("AFAs") with the Secretary of the Department of Health and Human Services.

15. During the 1990s, the Cherokee Nation Health Service significantly expanded the number of IHS programs it administers, first under self-determination contracts and later under its Compact and AFAs. The Nation began construction, and later assumed operation, of the Redbird Smith Health Center located in Sallisaw (Sallisaw Clinic) starting in FY 1992. The Nation also assumed operation of the Wilma P. Mankiller Health Center located in Stilwell (Stilwell Clinic)

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[1] The Muskogee clinic is actually located just outside the TJSA in Creek territory, but it is operated by the Cherokee Nation with the permission of the Muskogee (Creek) Nation of Oklahoma and the IHS.

in FY 1994; the IHS contract health services outpatient program (CHS-OP) in FY 1995; and the IHS contract health services inpatient program associated with the IHS Hastings Hospital (CHS-IP) in FY 1997.

16. The Cherokee Nation takes great pride in operating and administering these federal health care programs for the benefit of Cherokee citizens and other eligible beneficiaries within the TJSA. The Nation strives to provide the highest level of health care services with the limited financial resources at its disposal. Unfortunately, the IHS has failed to properly fund the most recently assumed clinics and health care programs, and this funding shortfall has only exacerbated an already severe crisis in Cherokee health care funding.

17. Historically, Native care health services in the Oklahoma service area have received the lowest levels of federal funding of any of the IHS service areas. For instance, in 1998, the Oklahoma area received only $856 in per capita funding while such areas as Portland and Nashville received $1,698 and $1,800 in per capita funding respectively. Making matters worse, the Cherokee Nation has historically received less federal funding per capita than other Indian tribes in the Oklahoma area.

18. Given the great unmet Native health care needs in Oklahoma and particularly in the Cherokee area, it has been one of my highest priorities as Executive Director to preserve, protect and maximize IHS program funding for direct health care services. However, in order to avoid using direct program funding to pay for equally critical and necessary administrative and support services, the Cherokee Nation Health Service must receive the full amount of contract support cost funding (both direct contract support costs and so-called "indirect costs") to which it is legally entitled.

19. Unfortunately, the IHS has refused to provide any contract support cost ("CSC") funding for the two clinics and

contract health care programs more recently assumed by the Nation. Under the terms of Cherokee's Compact and FY 1997 AFA, the Nation operated five rural outpatient clinics (the Muskogee clinic was not established until FY 1998). It also operated the inpatient and outpatient contract health programs associated with the Hastings Hospital and the outpatient contract health program associated with the Claremore Hospital.

20. Under its Compact and FY 1997 AFA, the Cherokee Nation received total direct program funding of $32,587,392 to operate the five outpatient clinics and all other IHS-funded health care programs. The Cherokee Nation requested, and the IHS Oklahoma Area Office approved, specific amounts of direct recurring and nonrecurring CSC and nonrecurring indirect CSC for each of these programs. The Cherokee Nation also proposed (and the Office of Inspector General later approved) an indirect cost rate of 14.93 percent.

21. However, based on an internal CSC policy which the Cherokee Nation has always maintained was unlawful, the IHS refused to pay any CSC funding, either for direct or indirect costs, for the Sallisaw Clinic, the Stilwell Clinic, CHS-OP or CHS-IP because these programs were not high enough on the IHS "queue" to receive a portion of the so-called "ISD Fund."

22. The IHS paid the Cherokee Nation only $1,656,151 in indirect costs in FY 1997. In contrast, the IHS paid the Cherokee Nation $1,705,925 in indirect costs in FY 1996, a year when the Nation's indirect rate was only 12.2 percent and its direct cost base was approximately $8,000,000 less than in FY 1997.

23. During negotiations over the FY 1997 AFA, the IHS took a particularly harsh position with regard to CSC funding. Despite prior year agreements, the IHS flatly refused to agree to pay indirect costs in accordance with the Nation's indirect rate agreement. In FY 1997, the IHS rejected AFA language

used in prior fiscal years which stated that "[t]he amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996." The IHS agreed only to pay a specified "minimum amount of funds allocated to the [N]ation." In an endnote to the FY 1997 AFA, the Nation memorialized its disagreement with IHS's decision to pay the Nation indirect costs without regard to the Nation's indirect cost rate agreement.

24. In the end, IHS disregarded all four newer programs as part of the Cherokee Nation "direct cost base." To the extent it actually multiplied the Nation's indirect rate by this unlawfully reduced base, it never even paid the resulting under-calculated amount. Instead, the IHS paid the Nation only the "minimum amount" described in the FY 1997 AFA.

25. Providing adequate funding to met the health care needs of Native Americans is part of the federal government's trust responsibility toward Indian tribes. The federal funds at issue in this litigation pay for critical and necessary health care programs. These programs primarily serve a remote and needy rural population which does not have access to a wide range of health care services.

26. If CSC funding is not provided at levels mandated by federal law, the Cherokee Nation Health Service is forced to divert direct health care funding to pay for necessary administrative and contract support costs. The Nation must perform these administrative functions to comply with other federal laws which require competent accounting and administration of our health care programs.

27. For this reason, the CSC shortfall in FY 1997 effectively reduced the Nation's direct health care funding dollar for dollar to the extent of the shortfall. The Nation's medical programs, and ultimately our patients, suffered directly as a result of these unlawful shortfalls in CSC funding.

28. In the remainder of this Affidavit, I will briefly describe the clinics, services and health care programs operated by the Cherokee Nation Health Service.

29. The Wilma P. Mankiller Health Center in Stilwell is the largest Cherokee-operated outpatient clinic, and it offers the most comprehensive range of medical services. The Clinic provides basic outpatient medical care, a public health nursing service, a dental program, optometry, radiology, mammography, behavioral health services, a medical laboratory, a pharmacy, a community nutrition program, and an inpatient/outpatient contract health care program. Patient visits at the Stilwell Clinic have increased steadily over the last three years. According to the Resource-based Patient Management System (RPMS), an IHS-maintained data base, patient visits rose from 52,103 in FY 1996 to 59,694 in FY 1997 to 67,356 in FY 1998.

30. The Redbird Smith Health Center located in Sallisaw was the first clinic to be constructed and operated entirely under the direction of the Cherokee Nation. According to the RPMS, patient visits at the Redbird Smith Clinic rose from 42,491 in FY 1996 to 47,371 in FY 1997 to 52,563 in FY 1998. The Clinic offers outpatient medical services, behavioral health, public health nursing, laboratory, pharmacy, dental, community nutrition and contract health care.

31. The Sam Hider Jay Community Clinic is based in a former community hospital, which the Nation purchased in 1989. The Clinic averages about more than 25,000 outpatient visits per year and provides outpatient care to an active user population of over 8,400. Services provided include outpatient medical, dental, public health nursing, laboratory, pharmacy, radiology, mammography, community nutrition and contract health care.

32. The Nowata Primary Health Care Clinic is housed in modular units located in a Nowata industrial park. Services

include outpatient medical, public health nursing/community health representatives, a laboratory, a pharmacy and contract health care. The Clinic averages more than 14,500 outpatient visits per year and has an active user population of over 4,100.

33. The A-mo Community Clinic in Salina is housed in a new building built by the Cherokee Nation at its own expense in 1995. The Clinic averages about 22,500 outpatient visits per year. It offers outpatient medical, public health nursing, laboratory, pharmacy, community nutrition, radiology and optometry.

34. The Muskogee Health Center operates in a space leased by the Nation near the Muskogee Regional Medical Center. The Center averages more than 16,800 visits per year and has an active user population of at least 3,400. Its principal focus is maternal and child health care, but it also offers a full-time general practitioner, a family nurse practitioner, a public health nurse, a dietician, behavioral counselors, and a pharmacist.

35. The Cherokee Nation purchased a Mobile Health Unit with federal funds in 1998. The Mobile Health Unit is the size and shape of a large city bus, and it offers basic medical care and health screening to four rural towns in the northern region of the Cherokee TJSA, Bartlesville, Vinita, Collinsville, and South Coffeyville. Directed by a physician in the Nowata Clinic, the Mobile Health Unit is staffed by a family nurse practitioner, a licensed practical nurse and an emergency medical technician/driver.

36. This Mobile Health Unit and the six outpatient clinics represent, for the most part, the only local health care resources for the residents of rural and remote counties within the TJSA, whether they are Native or non-Native. In the more remote areas, the Cherokee Nation Health Service also provides health care to non-Native patients on a fee-for-service basis.

37. In addition to these outpatient facilities, the Nation operates an Emergency Medical Services (EMS) facility in Tahlequah which provides 24-hour emergency medical services to patients of Hastings Hospital. The EMS facility also provides transport service throughout the 14-county area; land, water and specialty rescue; disaster and mass casualty management; first-responder and other EMS training; and emergency ambulance service within Cherokee County. As part of its ESM [sic] Program, Cherokee Nation Health Services also established the first "911" emergency calling system ever provided to residents in Cherokee County.

38. The Rural Eye Program is provided through an agreement between the Cherokee Nation Health Service and Northeastern State University College of Optometry. The Program's emphasis is to detect and treat vision problems common to Native Americans, such as the complications resulting from diabetes and glaucoma. The Program includes a mobile eye clinic to provide eye care to elderly patients or others without transportation in the TJSA.

39. The Public Health Nursing Program provides community outreach programs to encourage basic health care and healthy living. The Program addresses the environmental, psychosocial, economic and educational needs of the patient, as well as the influences which affect the patient's overall health status. Community health representatives, working as part of the Public Health Nursing Program, provide home visits for assessment, referral and liaison services between patients and the Cherokee health care system, prevention education, chronic disease management and cultural activities designed to enhance positive group identity.

40. Behavioral Health Services provides outpatient counseling for personal difficulties ranging from blended family concerns to depression and an inpatient facility for youth experiencing substance abuse problems. Along with individual therapy, the program offers family therapy, parenting edu-

cation, domestic violence intervention, child abuse screening and psychological testing.

41. Contract Health Services helps eligible beneficiaries who require specialty care that is not directly available from the clinics and hospitals. High risk obstetrics, cancer treatment and transplants are some of the specialty care areas which are typically referred out to contract physicians and funded under the Contract Health program. The Cherokee Nation Health Service is responsible for the administration of outpatient contract health services (CHS-OP) in Washington, Nowata, Craig, Mayes, Delaware and Muskogee counties. It is responsible for both inpatient (CHS-IP) and outpatient contract health services (CHS-OP) in Cherokee, Adair, and Sequoyah counties.

42. The Cherokee Nation Health Service contracts with over 250 specialty care physicians and health facilities to provide a variety of specialty care treatments ranging from specialized radiology and other screening to orthopedics and cardiology. More than 20 distinct disciplines are represented in this "micro-network" of contract providers.

43. This specialty care provider network represents an innovative and cost-saving measure that the Cherokee Nation Health Service initiated to maximize its federal contract health care funding. When the federal government administered the CHS-IP and CHS-OP programs within the Cherokee TJSA, the IHS had no preexisting contractual relationships with specialty care providers. As a result, the IHS typically had to pay much higher consultation and treatment rates than the Cherokee Nation now pays for the same services.

44. Nevertheless, because the Cherokee health budget is so severely underfunded, we cannot accommodate the needs of every patient for contract health care. The Cherokee Nation Health Service has developed medical priority lists for inpatient and outpatient contract health services. It developed

these lists with the advice and concurrence of IHS physicians working at the Hastings and Claremore Hospitals. The priority lists are used to determine which contract health referrals will be authorized for payment. Many requests for contract health care are never approved due to a lack of overall program funding. Some services, such as "urgent diagnostic studies," are funded at times and not funded at other times, depending on the amount of contract health funding expended at a particular point in the budget cycle.

45. According to RPMS figures, contract health denials at the Stilwell clinic over the last five years were highest in FY 1997. The contract health staff at the Stilwell Clinic denied 127 specialty care requests in FY 1995, 268 requests in FY 1996, 592 requests in FY 1997 and 440 requests in FY 1998. So far in FY 1999, the Stilwell staff has been forced to deny 472 contract health requests for specialty care.

46. In addition to these IHS-funded programs, the Cherokee Nation Health Service is also responsible for operating several other medical, social and health-related programs.

47. The Women, Infants & Children Program (WIC) is funded through the federal Department of Agriculture. It serves low and moderate income pregnant, breast-feeding and postpartum women as well as infants and children up to five years of age who have been determined to be at nutritional risk. Women receive supplemental foods for themselves and their children, along with nutrition education counseling and early access to prenatal care to ensure a healthy pregnancy and baby.

48. The Healthy Nation program, funded by the Robert Wood Johnson Foundation, provides education in proactive wellness through activities in schools, health fairs, clubs, camps and a host of other programs. The program emphasizes cultural values, physical fitness, prevention, safety and disease management.

49. The Jack Brown Center is a 20-bed facility providing treatment for chemical dependency in a residential setting to Indian adolescents. The length of stay in the program ranges from 30 to 120 days. The center is staffed by 36 professionals and paraprofessionals, including a clinical psychologist.

50. The Cherokee Nation Cancer Registry, funded through a grant from the National Cancer Institute, gathers data on cancer incidence, treatment and survival rates. This data is used by the Nation to improve its health system.

51. The Diabetes Grant Program, funded by the IHS, provides foot care, dietary help, medication, and self-monitoring supplies to the more than 12,000 individuals in the TJSA who have been diagnosed with diabetes.

52. The Early Cancer Detection Program, funded by the Centers for Disease Control, provides screening, information, education, coordination and advocacy for the detection and treatment of breast and cervical cancer.

53. The Elder Services Coordination Project was developed to coordinate programs to meet the health and other needs of elders. It provides, among other services, assistance with housing, water sanitation, medical equipment, household safety devices, heating and air conditioning, and financial and family counseling.

54. These clinics, services and programs comprise the Cherokee Nation Health Service, a division of the Cherokee Nation.

55. Along with this Affidavit, I have provided several documents which generally describe Cherokee health programs and confidentially summarize patient data and health care statistics. These documents, identified as Plaintiffs Exhibits (48)-(62), were kept in the course of the Cherokee Nation Health Service's regularly conducted business activities and were not specially produced for this or any other

litigation. The information contained in these documents and brochures is true and accurate to the best of my knowledge and belief.

FURTHER YOUR AFFIANT SAYETH NOT

/s/ Bill Thorne
BILL THORNE, Executive Director
Cherokee Nation Health Service

Subscribed and sworn to before me this 19th day of July, 1999.

/s/ Bobbie L. Barr
BOBBIE L. BARR, Notary Public
Tahlequah, Oklahoma

My Commission expires July 06, 2003.

COMPACT OF SELF-GOVERNANCE
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

Article I—Authority and Purpose

Section 1—Authority. This agreement, denoted a Compact of Self-Governance (hereinafter referred to as the "Compact"), is entered into by the Secretary of the Department of Health and Human Services (hereinafter referred to as the "Secretary") for and on behalf of the United States of America pursuant to the authority granted by Title III of P.L. 93-638, as amended and by the Principal Chief of the Cherokee Nation for and on behalf of the Cherokee Nation by the authority of the Constitution (hereinafter referred to as the "Nation").

Section 2—Purpose. This Compact shall be liberally construed to achieve the following purposes:

(a) to carry out an unprecedented Self-Governance Demonstration Project, authorized by Title III of P.L. 93-638, as amended which is intended as an experiment in the areas of planning, funding and program operations within the Government-to-Government relationship between Indian tribes and the United States. In fulfilling his responsibilities under the Compact, the Secretary hereby pledges that the Department will conduct all relations with the Nation on a Government-to-Government basis. The Demonstration Project encourages experimentation in order to determine how to improve this Government-to-Government relationship and promote the perpetuation' of the Nation. The outcome of the Nations experiment cannot be known in advance and

each experiment as reflected in each specific Compact, binds no party beyond the terms of each specific Compact;

(b) to enable the Cherokee Nation to redesign services of the Indian Health Service under the terms set forth in the Compact; to reallocate funding for such services, according to its tribal priorities; to provide such services, as determined by its tribal priorities; to enhance the effectiveness and long-term financial stability of its tribal government; and to reduce the Federal bureaucracy; and

(c) to enable the United States to maintain its unique and continuing relationship with and responsibility to the Cherokee Nation through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of services to an effective and meaningful participation by the Indian people in the planning, conduct and administration of those services.

Section 3—Applicable Law and Forums. The duly enacted laws of the Nation shall be applied in the execution of this Compact and the powers and decisions of the Nation's Court shall be respected, to the extent that federal law, construed in accordance with the applicable rules of construction and Title III of P.L.93-638, as amended is not inconsistent.

Article II—Obligations of the Nation

Section 1—Consolidation. With the exception of the specific responsibilities of the United States identified and (retained in Article III, Section 3, and specified in Section 4 and footnoted in Section 2 and 3 of the attached Annual Funding Agreement) the Nation hereby consolidates and will perform the services within the General Budget Categories as provided in Section 2 and 3 of the Annual Funding Agreement incorporated herein in Article V, Section 1 of this

Compact. To the extent a service included within such Annual Funding Agreement is included within a contract or grant entered into pursuant to P.L. 93-638 or any other contract or grant exclusively with the Nation, or is subject to any obligation arising from such contract or grant, that contract or grant with the Nation is hereby canceled and the parties' obligations thereunder are hereafter governed by this Compact.

Section 2—Amount of Funds. The total amount of funds associated with the consolidation and redesign provided for in Section 1 of this Article which the Secretary shall make available to the Nation shall be established in the Annual Funding Agreement and amendments to the Annual Funding Agreement, between the Secretary and the Nation, which is incorporated in its entirety in this Compact and attached hereto as provided in Article V, Section 1.

Section 3—Tribal Programs. The Nation agrees to provide the services identified within the General Budget Categories in Section 2 and 3 of the Annual Funding Agreement.

Section 4—Reallocation. The Nation can reallocate funds from one service to another within, between, or among the Standard Indian Health Service Programs General Budget Categories contained within the Annual Funding Agreement Section 2 and 3 and shall be governed only by tribal law and procedure and shall not require the Secretary's consent. However, the Nation is not authorized to redesign, shift or transfer any funding for services which are subject to special restriction imposed by congressional directives.

Article III—Obligations of the United States

Section 1—Solemn obligation.

(a) Nothing in this Compact is intended to, nor should it be interpreted to, terminate, waive, modify, reduce or diminish in any way the solemn obligation of the United States to the Nation or individual Indians.

(b) If the United States' Designated Official determines from any source that safety is endangered by the Nation's action or inaction, the United States' Designated Official shall immediately notify the Nation of the specific concerns relative to the health program.

(c) If the solemn obligation is in imminent jeopardy, as defined in this subsection, the United States shall, upon written notice and a hearing on the record to the Nation, immediately take over the responsibility for the management of that imminently jeopardized solemn obligation, and may use a reasonable portion of funds remaining available for that purpose, notwithstanding any other provision of this Compact.

Section 2—Programs Retained. As specified in Section 4 of the Annual Funding Agreement, the United States hereby retains the services with respect to the Nation's that are not specially assumed by the Nation in the Annual Funding Agreement.

Section 3—Eligibility for New Services, Service Increases, and Non-recurring Resources. The Nation shall be eligible for new services; service increases, mandatories, population growth, health services priority system, contract support cost and others; and non-recurring resources; on the same basis as other tribes and the Secretary shall advise the Nation of the funding available for such services. To the extent that such services are subject to consolidation under Title III of P.L. 93-638, as amended they may be included within the Compact and Annual Funding Agreement by mutual agreement of the parties under Article IV, Section 22 and 27.

Section 4—Special Relief Programs. The United States will maintain the Nation's eligibility for special disaster relief and assistance programs as the same may from time to time become available, and shall retain responsibility to assist the Nation in responding to natural or other disasters, emergencies, and unforeseen acts of God.

Article IV—General Provisions

Section 1—Duration. The term of this Compact begins October 1, 1993 and shall extend thereafter throughout the times period authorized by Title III of P.L. 93-638, as amended and any subsequent amendments thereto.

Section 2—Effective Date. The Compact and attached Annual Funding Agreement are effective on October 1, 1993. In accordance with Title III of P.L. 93-638, as amended the Compact and Annual Funding Agreement, with signatures, shall be submitted by the Secretary and the Nation to the Select Committee on Indian Affairs of the United States Senate, to the Committee on Interior and Insular Affairs of the United States House of Representative at least ninety days before the effective date prescribed in Section 1. Successor Annual Funding Agreements shall be likewise submitted and made effective.

Section 3—Funding Amount. Subject only to the appropriation of funds by the Congress of the United States, and to adjustments pursuant to section 106(b) Title III of P.L. 93-638, as amended the Secretary shall provide to the Nation the total amount of funds specified in the Annual Funding Agreement incorporated by reference in Article V, Section 1. In accordance with Section 304 Title III of P.L. 93-638, as amended the use of any and all funds under this Compact shall be subject to specific directives or limitations as may be included in applicable appropriations acts.

Section 4—Payment. Payments shall be made as expeditiously as possible and should include financial arrangements to cover funding during periods under Continuing Resolutions to the extent permitted by such Resolution. For each fiscal year covered, the Secretary or his authorized representative will make available the funds specified for that fiscal year under the Annual Funding Agreement by paying to the Tribe on a quarterly basis one-quarter of the total amount

provided for in the Annual Funding Agreement for that fiscal year, or by using an instrument such as a letter of credit, or other method authorized by law, or a combination thereof, as may be specified in the Annual Funding Agreement. To the extent applicable, if payments are to be made on a quarterly basis, each quarterly payment should be made on the first working day of each quarter of the fiscal year except for the first quarter, for which the one-quarter payment shall be made on or therefore 10 calendar days of the date on which the Office of Management and Budget apportions the appropriations for that fiscal year for the services subject to the Compact.

Section 5—Reports to Congress. In order to implement Section 305 of Title III of P.L. 93-638, as amended on each January 1 and July 1, throughout the period of the Compact, the United States shall make a written report to the Congress which shall separately include the views of the Nation and describe the relative costs and benefits of carrying out this Compact, based upon mutually determined baseline measurements jointly developed by the parties pursuant to Section 17 of this Article.

Section 6—Audits. The Nation shall provide to the Secretary an annual single organization-wide-audit report as prescribed by the Single Audit Act of 1984, 31 U.S.C. 7501, *et. seq.*, and Circular A-128 of the Office of Management and Budget, which audit report shall adhere to standard accounting principles. The Secretary shall not require the Nation to satisfy any other audit or accounting standards for purposes of this Compact.

Section 7—Records. In addition to whatever provisions may apply under the Nation's law on document disclosure and govern record-keeping, the Nation shall maintain a record-keeping system and provide the Secretary reasonable access to records which permits the Department to meet its minimum legal record-keeping program requirements under

the Federal Records Act, 44 U.S.C. 3101, *et. seq.*, which will allow for retrocession of this Compact in whole or in part pursuant to Section 12 of this Article and satisfy all audit requirements under this Compact.

Section 8—Property. The following provisions supplement the Nation's law on property procurement and management and govern such activity associated with this Compact.

(a) Departmental Property. At the request of the Nation, the Secretary shall make available to the Nation reasonably divisible real property, facilities, equipment and personal property that the Department previously utilized to provide the services-now consolidated by the Nation pursuant to Article III of this Compact and Section 2 and 3 of the Annual Funding Agreement. A mutually agreed upon list specifying the property, facilities, and equipment shall also be prepared before the effective date of this Compact, and periodically revised thereafter.

(b) Excess Property. Subject to the agreement of the General services Administration, the Secretary hereby delegates to the Nation the authority to acquire and take title to such "excess" property as may be appropriate in the judgment of the Nation to support the services designated under Article II of this Compact and Section 2 and 3 of the Annual Funding Agreement. The Secretary agrees to make best efforts to assist the Nation in obtaining such confiscated or excess property as may become generally available to tribes or local governments. Subject to the agreement of the General Services Administration, a Screener Identification Card (General Services Administration Form 2946) shall be issued to the Nation no later than the effective date of this Compact. Upon request, the Secretary's Designated official shall assist the Nation in securing the use of this Card.

(c) Capital Equipment. The Nation shall determine what capital equipment, leases, rentals, property or services it shall require to perform its obligations under Article II of this Compact, and shall acquire and maintain records of such capital equipment, leases, rentals, property or services through tribal procurement procedures.

Section 9—Savings. Any funds not expended during the term of any of the compact fiscal years may be carried over and spent in the succeeding years and that carryover shall not diminish the amount of funds the Nation is authorized to receive in any succeeding compact year.

Section 10—Use of Motor Vehicles. Subject to the agreement of the General Services Administration, the Secretary hereby authorizes the Nation to obtain Interagency Motor Pool vehicles and related services, if available, for performance of any activities under this Compact.

Section 11—GSA Rates, Schedules and Agreements. Subject to the agreement of the General Services Administration, the Secretary hereby authorizes the Nation to obtain access to all Rates, Schedules, and Agreements, if available, for performance of any activities under this Compact.

Section 12—Disputes.

(a) Obligations of the United States under this Compact shall be deemed the same as "duties" under Section 110 of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

(b) In addition or as an alternative to remedies and procedures prescribed by Section 110 of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638, the parties may jointly submit disputes under this Compact to non-binding third-party mediation, which mediator is chosen

by the Nation and the Secretary nominating third-parties who together choose a third-party mediator ("third-party" here means a person not employed by or significantly involved with either the Nation or the United States).

Section 13—Retroceding this Compact. Any retrocession under this Compact shall be governed by the provisions of Section 105(e) of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

Section 14—Tribal Administrative Procedures. Tribal law and tribal forums shall provide administrative due process rights pursuant to the Indian Civil Rights Act of 1968, 25 U.S.C. 1301, *et. seq.*, that persons, or groups of persons may have with respect to services that are provided by the Nation pursuant to this Compact.

Section 15—Successor Annual Funding Agreement. Negotiations for a successor Annual Funding Agreement as provided for in Article V, Section 1, shall begin no later than 120 days in advance of the conclusion of the preceding Annual Funding Agreement. Pursuant to Section 301 and Section 303(a) Title III of P.L. 93-638, the Secretary shall make best efforts to continue and to promote this demonstration project in preparing his budgets for subsequent years. The Nation is hereby assured that future funding of successor Annual Funding Agreements may be reduced only pursuant to the provisions of Section 106(b) of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638. The Secretary agrees to prepare and supply relevant information, and promptly to comply with the Nation's requests for information reasonably needed to determine the funds that may be available for a successor Annual Funding Agreement as provided for in Article V, Section 1 of this Compact.

Section 16—Regulatory Authority. The Secretary and the Nation agree to utilize the following procedures governing the establishment and application of standards and regulations under this Compact:

(a) Program Standards. The Nation agrees to abide by existing federal standards, where such standards exist, in carrying out the services under the Compact. The Nation may adopt its own standards to be used in place of the existing federal standards.

(b) Federal Regulations. In accordance with Section 303(e) Title III of P.L. 93-638, as amended the Secretary will seek to expedite the waiver of federal regulations which the Secretary or the Nation determine presents an obstacle to the carrying out of the Compact, its purposes, and the services pursuant to the Compact, under the following procedures:

(i) prior to the effective date of the Compact, the Secretary and the Nation will seek to identify any federal regulations that may require waiver in order to effectively carry out the Compact;

(ii) if at any time the Nation determines that one or more specific federal regulations requires waiver to effectively carry out the Compact, the Nation may submit its written request for waiver to the Secretary concerning those regulations over which the Secretary has authority, and the Secretary shall render a written decision to the Nation within 30 working days of the date of the Secretary's receipt of the Nation's request.

Section 17—Establishment of Baseline Measures. In accordance with Title III, Section 305 of P.L. 93-638, as amended, the Secretary and the Nation will jointly develop baseline measures within 60 days of signature of this compact which shall be submitted as Attachment 3.

Section 18—Inspector General Authority. Nothing in this Compact shall limit the authority of the Inspector General in carrying out his statutory duties and responsibilities.

Section 19—Designated officials. On or before the effective date of this Compact, both the United States and the Nation shall provide each other with a written designation of a senior official as its representative/liaison official for notices, proposed amendments to the Compact and other purposes arising under this Compact.

Section 20—Indian Preference in Employment, Contracting and Subcontracting. Tribal law shall govern the provision of Indian preference in employment, contracting, and subcontracting pursuant to this Compact. Section 104 Title III of P.L. 93-638, as amended shall apply to individuals who leave federal employment for tribal employment.

Section 21—Insurance. The Nation shall be fully covered by such liability insurance or equivalent coverage that the Secretary provides or obtains pursuant to Section 102(c) of the Indian Self Determination and Education Assistance Act Amendments of 1988, Title III of P.L. 93-638.

Section 22—Compact Modifications. Subject to applicable laws, modifications to this compact shall be in the form of a written amendment to the compact, and shall require the written consent of the Nation and the United States.

Section 23—Construction. In the implementation of this Compact, the Secretary, to the extent feasible, shall interpret Federal Laws and Regulations in a manner that facilitates this Compact in accordance with Section 303(e) Title III of P.L. 93-638.

Section 24—Officials Not to Benefit. No member of or delegate to Congress, or appropriate agency official, shall be admitted to any share or part of any contract executed pursuant to this Compact, or to any benefit that may arise

therefrom; but this provision shall not be construed to extend any contract under this Compact if made with a corporation far its general benefit.

Section 25—Covenant Against Contingent Fees. The parties warrant that no, person or selling agency has been employed or retained to solicit or secure any contract executed pursuant to this Compact upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor far the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul any contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

Section 26—Penalties. The parties agree that the criminal penalties set forth in 25 U.S.C. 450d apply to all activities conducted pursuant to this Compact.

Article V—Attachments

Section 1—Annual Funding Agreement. The first Annual Funding Agreement incorporating those services to be performed, within the General Budget Category assigned, the funds to be provided, and the budget year to which it applies, is hereby incorporated in its entirety in this Compact and attached hereto as Attachment 1. Each Successor Annual Funding Agreement shall be likewise incorporated, attached, and identified as Attachment 1 for the relevant budget year to which it applies.

Section 2—Authorization of Compact. This Compact is authorized to be executed by the Principal Chief of the Cherokee Nation pursuant to the authority of the Constitution

and by Resolution, dated February 13, 1993, of the Council of the Cherokee Nation authorizing the submission of this compact and hereto submitted as Attachment 2.

Section 3—Baseline Measures. Baseline Measures will be negotiated within 60 days of signature of this compact and will be incorporated into this compact as Attachment 3.

Section 4—Inconsistent Terms. To the extent that any attachment is inconsistent with the terms of this Compact, the Compact shall govern.

DATED THIS 30th DAY OF JUNE, 1993.

CHEROKEE NATION

By /s/ Wilma P. Mankiller
WILMA P. MANKILLER, Principal Chief
Cherokee Nation

UNITED STATES OF AMERICA

By /s/ Michael E. Lincoln
MICHAEL E. LINCOLN
Director Indian Health Service
Department of Health and Human Services

FISCAL YEAR 1997
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation (the Nation) and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P.L. 936-38, as amended. This AFA is incorporated into and govened by the Compact of Self Governance entered into between the Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer, and, subject to the terms of the Compact, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the following General Budget Categories as a consolidated Tribal Government budget:

1. Clinical Services:	1997 Totals
Hospital & Health Clinics	$ 9,171,670.00
Dental Services	1,581,207.00
Mental Health	1,254,800.00
Alcohol & Substance Abuse	630,085.00
Total Clinical Services (l), (2), (3), (4)	$12,637,762.00
2. Contract Health Services (l), (2), (5), (6), (7), (8)	2,000,602.00

3. Preventive Health Services:

Public Health Nursing	$ 876,993.00
Health Education	163,300.00
Community Health Representatives	1,511,070.00
Total Preventive Health Services (1), (2), (3), (4)	$ 2,551,363.00
4. Direct Contract Support Costs (1), (2), (9)	$ 473,077.00
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$17,662,804.00

SECTION THREE
FORMULA DRIVEN FUNDING

The following services, programs or activities shall be funded as "Formula Driven" funding:

HEADQUARTERS SHARE:

OEHE (10)	$297,600.00
Equipment Replacement Requirement	139,384.00
Facility Support	30,020.00
Unmet Need (11)	
Sub-Total	$467,004.00

AREA SHARE:

OEHE Service Unit Direct	$551,495.00
OEHE OCAO Tribal Share	184,498.00
Facilities Support	14,897.00
Maintenance & Improvement (M&I) 12	70,223.00
Sub-Total	$821,113.00

HOSPITALS & CLINICS:
Continuing Medical Education
Nursing Continuing Education
Special Pay
Change of Station
Model Diabetes
DENTAL:
Equipment Replacement

Special Pay
Change of Station
Continuing Education
Training
MENTAL HEALTH:
Change of Station
Special Pay

	Funding to be determined
Sub-Total (13)	$
	Funding to be determined
Share of Fiscal Intermediary (Contract Health) (14)	
Sub-Totals	$
TOTAL SECTION III FUNDING	$1,288,117.00

SECTION FOUR
CONGRESSIONALLY—EARMARKED FUNDING

Funding for the following programs, activities or services shall be furnished to the Nation and expended in accordance with the specific purposes expressly stated in federal legislation:

Sanitation Facilities Construction (15)	$_____
Total Congressional Earmarked Funding (15)	$_____

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

Subject to the provision of Section Twelve of this AFA, the United States shall make available to the Nation its "tribal shares" of the IHS Oklahoma City Area Office (OCAO) and the IHS Central Headquarters budgets in the amounts identified in this Section below. The Nation is authorized to expend, reallocate, shift or transfer any or all of such funding and administer same as a consolidated tribal government budget. The funding identified below as the Nation's tribal share of the OCAO and Headquarters budgets represents a

compromise between the Nation and the United States in light of conflicting views as to the amounts to be made available for tribal share allocation, the percentages of the Nation's share compacted, and the formulas used to allocate tribal share funding among the tribes. By accepting such funding, the Nation is not agreeing that it is an accurate allocation of its true tribal share of the OCAO or Headquarters budgets. The parties hereby agree to review the OCAO and Headquarters determination of their respective residual resources. The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution prior to and/or during Fiscal Year 1997 (FY-97), in which case the Nation's share of such additional funding shall be identified in an addendum hereto and made available to the Nation.

Central Headquarters Tribal Share (5), (16), (17)	$1,692,901.00
Area Office Tribal Share (5), (16), (17)	919,264.00
TOTAL OCAO AND HEADQUARTERS TRIBAL SHARE	$2,612,165.00

SECTION SIX
INDIRECT COST FUNDING

The minimum amount of funds allocated to the nation under this AFA for Indirect Cost Funding shall be established and paid as follows:

Indirect Cost All Program Funds (18)	$1,441,254.00
TOTAL INDIRECT COST FUNDING	$1,441,254.00

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,662,804.00
Section III Funding	$1,288,177.00

Congressionally Earmarked Funding	
Tribal Shares—OCAO and Central HQ Offices	2,612,165.00
Indirect Cost Funding (18)	1,441,254.00
TOTAL FY-97 FUNDING (19) (20) & (21)	$23,004,400.00

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore Service Unit—Inpatient Medical Services in Claremore and associated Direct and Contract Health Services; outpatient clinics located in Claremore; and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Tahlequah Service Unit—Inpatient Medical Services in Tahlequah and associated Direct Services, out-patient clinics located in Tahlequah, and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Buy-Indian Contract for Regional Adolescent Treatment Center—The terms of the Jack Brown Treatment Center contract shall govern the program services and activities.

The Nation reserves the right to include such services and the funding therefore in this AFA, by way of amendment, or in future AFA negotiations.

SECTION NINE
ITEMS OF DISPUTE

Any items or issues remaining in dispute under this AFA as of the execution date hereof shall be identified on an attachment to this AFA labeled "Items or Issues in Dispute." The disputed items/issues shall be transmitted to the Secretary immediately. The parties may brief the issues if they choose, but in any event a decision shall be made by the Secretary in

writing in a timely fashion to avoid disruption of services. If the decision pertaining to a disputed item or issue grants the specific relief requested by the Nation, the funding shall be modified into this AFA by way of the Secretary's written decision which shall become a part of the AFA. If a disputed item or issue is settled between the parties, the resolution shall be set forth in an addendum to this AFA.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith. Provided, however, this AFA shall not be modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

SECTION ELEVEN
PREVIOUS P.L. 93-638, SECTION 102, CONTRACTS/GRANTS FUNDS

Any contract funds heretofore made available to the Nation under 25 U.S.C. § 450f which remain unexpended as of the effective date hereof shall be expended in accordance with the appropriate provisions of this AFA. Any such funds, and the corresponding services or activities, shall not be subject to the provisions of said contracts or grants except as provided herein or in any amendment hereto.

SECTION TWELVE
PAYMENT

The parties agree that IHS will request apportionment of 100% of total FY-97 AFA funding in the first quarter. Upon

receipt of apportioned funds the IHS will within 30 days process and make available to the Cherokee Nation 100% of the direct and 90% of the HQ's and Area Tribal Share. Within 90 days of apportionment the IHS will make available the remaining 10% of HQ's and Area Tribal Shares. The Nation shall not be held accountable for interest earned on such funds, pending their disbursement by the Nation.

SECTION THIRTEEN
BASELINE MEASURES

In accordance with the Nation's Self-Governance Compact, the Nation agrees to submit semi-annual and annual Self-Governance Baseline Measures reports to the Secretary. The Nation and IHS are presently jointly involved in the development of the format for the FY-97 Baseline Report and agree that when finalized the baseline measures for FY-97 will be included as an addendum to the FY-97 AFA.

SECTION FOURTEEN
EFFECTIVE DATE

This AFA shall be effective on October 1, 1996, and this AFA, and any amendments hereto, shall remain in effect through September 30, 1997.

SECTION FIFTEEN
OTHER PROVISIONS

1. The Nation shall have the right to participate in the development of "Budget Enhancements" for inclusion into the Indian Health Service's proposed budget.

2. The OCAO shall provide the Nation with copies of all of the Area's advice of allowance documents that pertain to the Nation and OCAO/HQ's funds when they are processed in the Area Office.

3. The OCAO shall provide to the Nation the opportunity to share in year-end resources received by the OCAO or are

distributed by the Headquarters. Resources referred to herein are those that were not otherwise available for Tribal Shares distribution from the Oklahoma Area Office Residual or Retained Tribal Shares or from Headquarters. The IHS shall provide the Nation with a financial report reflecting the distribution and method used.

4. The Nation has requested that title to all government personal property identified in a physical inventory conducted by OCAO Property Management personnel, and currently utilized in conjunction with the Cherokee Nation's compact with IHS be transferred to the Nation.

5. The Nation shall be notified of and authorized to participate in property screenings associated with "Project Transam" by IHS Headquarters. Pursuant to the aforementioned, IHS shall notify the Nation of scheduled lotteries to be conducted relevant to "Project Transam" whereby the Nation is authorized to observe and/or participate in such process.

6. The IHS shall make available to the Nation on September 1, 1997, its share of the balance of both the Emergency and the Management Initiative Fund by way of an Addendum during FY-97.

7. The Nation will utilize the Federal Provider number at the W.W. Hastings Indian Hospital and transmit claims to the State of Oklahoma Medicaid program and Blue Cross and Blue Shield of Texas for Medicare. This process will remain in effect until such time as the Nation is allowed to receive payments directly from the aforementioned fiscal intermediaries. The OCAO will provide the Nation copies of EOB's pertinent to the Nation's Medicaid and Medicare collections and monthly third-party cash collection reports.

8. In the event of damage or destruction caused by an "Act of God" to any health facilities funded by the IHS and operated by the Nation, the IHS shall provide same treatment as is provided IHS operated facilities under similar circumstances.

9. IHS will provide sufficient documentation to facilitate the Nation's reconciliation of the AFA funding agreement to the cash actually received on a quarterly basis.

10. The Indian Health Service will be responsible for all costs associated with severance pay relative to all Special Purpose IPA and MOA staff separations occurring as a result of the Nation's compacting IHS programs and services. Resources required to fund these costs in no way will reduce the negotiated AFA amount or tribal shares.

11. As authorized by P.L. 104-109, the Cherokee Nation hereby exercises its option to include the following provisions of Title I of the ISDA as part of this AFA, and shall have the same force and effect as if set out in full in Title III of this title and shall supersede any inconsistent provisions set forth in the Compact entered into between the Nation and HHS on June 30, 1993:

a) All of U.S.C. sec. 450i, entitled Retention of Federal employee coverage, rights and benefits by employees of tribal organizations, except omitted subsections (a) to (d), (k) and (1)

b) All of § 450f(c), entitled "Liability insurance; waiver of defense"

c) All of § 450f(d), entitled "Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions"

d) All of 25 U.S.C. § 450j(e), entitled "Effective date for retrocession of contract"

e) All of § 450j(f), entitled "Use of existing school buildings, hospitals, and other facilities and equipment therein, acquisition and donation of excess or surplus Government personal property

f) All of 25 U.S.C. § 450j(k), entitled "Access to federal sources of supply"

g) All of 25 U.S.C. § 450j(l), entitled "Lease of facility used for administration and delivery of services"

h) All of 25 U.S.C. § 450j-l, entitled "Contract funding and indirect costs"

i) All of 25 U.S.C. § 450l(b) and all provisions of Section 1(b)(7) of Model Agreement contained in 25 U.S.C. § 450lc regarding federal records

j) All provisions of Section 1(b)(10) of Model Agreement, entitled "Transportation," and contained in 25 U.S.C. §450lc

k) All provisions of Section 1(b)(11) of Model Agreement, entitled "Federal program guidelines, manuals, or policy directives

l) All provisions of Section 1(b)(15) of Model Agreement entitled "Contract requirements; approval by Secretary," and contained in 25 U.S.C. § 4501c

m) All provisions of § 450m, entitled "Rescission of contract or grant and assumption of control of program, etc; authority; grounds; procedure; correction of violation as prerequisite to new contract or grant agreement; construction with occupational safety and health requirements"

n) All provisions of § 450m-l, entitled "Contract disputes and claims"

o) All provisions of §450n, entitled "Sovereign immunity and trusteeship rights unaffected"

SECTION SIXTEEN
ENDNOTES

1. Fiscal Year 97 funding increases for mandatories and for contract support, and funding for third-party collections are not included in this AFA, due to the lack of required information. Such funding shall be adjusted and modified into

this AFA when the actual FY 1997 appropriations become available, and the Nation's full share of such funding shall be paid. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future congressional action. The parties agree that any such funding which may be identified and made available for distribution to the Nation shall be transferred to the Nation without formal execution of an addendum or other modification document. The Nation shall be notified in advance of such transfer of funds and informed of the source and/or purpose of such funding.

2. Any FY-97 non-recurring funds not included in this AFA, shall be included herein when actual FY-97 appropriations become available.

3. After IHS has addressed the internal issues regarding the MOA/IPA Pilot Project and is prepared to implement it for all tribes in 1997, the Nation will be allowed to participate in said project.

4. The Nation's allocation of the Regional Supply Services Center (RSSC) resources are estimated to be $2,000,000 (subject to monthly reconciliation and adjustment). The parties agree that unless otherwise provided herein, these resources shall remain with OCAO, and the Nation shall issue monthly written notice to the Office of Self-Governance authorizing transfer of said funding to the RSSC after the Nation has completed the appropriate receiving reports for internal control; provided that the parties shall negotiate a Memorandum of Understanding setting forth more detailed guidelines for this payment procedure prior to October 1, 1996. It is understood that the Cherokee Nation shall seek the Secretary's or designee's approval of written procedures for the Nation's direct purchase of drugs and supplies from the IHS at the RSSC utilizing the Nation's allocation of RSSC resources; and the parties agree that if such approval is granted, the balance of the Nation's RSSC resource allocation

shall be transferred to the Nation, and RSSC shall invoice the Nation monthly for purchases of drugs and supplies. The Nation further reserves the right to negotiate a future addendum to the AFA to provide for a transfer of some or all of such resources for purchasing drugs and supplies from third-party suppliers. The IHS and the Nation agree to negotiate a new sur-charge rate applicable for Ada warehouse services prior to October 1, 1996.

5. The funding presently identified for Contract Health Services pertains to out-patient medical and/or dental associated with the Nation's five (5) health clinics. During final FY-97 negotiations on June 6th, the Nation notified the IHS of its intent to compact Contract Health Services for in-patient, out-patient and dental associated with the Tahlequah Service Unit (W.W. Hastings Facility) effective October 1, 1996, for FY-97. The Nation has requested information pertinent to finalizing the funding amounts associated with this CHS compacting process. (See June 10, 1996 letter to Randy Grinnell, Acting Area Director, OCAO from Dr. David Kingfisher, identified as "Attachment B" and expressly incorporated by reference in this AFA.) IHS shall respond to said request and shall make a determination of funding levels for said CHS services, as soon as possible, to ensure that the parties have sufficient time to negotiate and approve an Addendum to this AFA setting forth funding amounts and applicable footnotes prior to September 15, 1996.

6. The OCAO Indian Health Service shall process and pay if approved, for the following Contract Health Services referred and authorized by the Tahlequah Service Unit (W.W. Hastings Hospital), utilizing its FY-96 or prior fiscal year resources with an estimate completion date of December 31, 1998: (1) All non-emergency Contract Health Service authorizations for in-patient and out-patient services dated prior to October 1, 1996; (2) all emergency in-patient and out-patient services rendered prior to October 1, 1996, provided that IHS authorized payment within seventy-two hours of

provision of said services; and (3) all authorized in-patient and out-patient services, regardless of date of service, when such services were provided as a result of referrals arising from a diagnosis made during the course of emergency room treatment or in-patient admission occurring prior to October 1, 1996. OCAO payment for said above-described services shall in no way reduce the Cherokee Nation's negotiated AFA amount for FY-97.

7. All requests and documentation for Contract Health Service Catastrophic and Deferred Services resources will be sent directly to OCAO for processing and submission to IHS Headquarters East for funding determination and amendment of Funding Agreement.

Consistent with CHS eligibility regulations the following persons shall be eligible to receive the Nation's Contract Health Services funded under this AFA: 1) Cherokee Tribal Users residing within the Tahlequah Service Unit 2) All persons currently eligible for CHS under the Nation's five health clinics 3) non-indigenous users residing with the agreed upon Cherokee jurisdictional boundaries within the Tahlequah Service Unit.

9. The Nation maintains that for fiscal years 1992-1995, the Nation has not received all direct contract support funding, due the Nation, in accordance with effective dates that the new funding was authorized, relative to new and expanded programs.

10. For the Cherokee Nations allocation of OEHE Support Headquarters' funds the parties agree to continue the transition from a user population formula to the workload formula, as negotiated in the FY-96 AFA. The Nation's FY-97 allocation of funds is an amount equal to 80% of the FY-96 funding. The allocation for each succeeding fiscal year thereafter through FY-99 shall be 80% of the previous fiscal year's funding, provided, that if the workload formula or other formula approved by the Director would yield a larger allocation

for any of the fiscal years during the transition period, the larger allocation would apply for any such year. Accordingly, the estimated allocations for FY's-97 through 1999 are $297,600, $238,000, and $190,400, respectively, unless for any such fiscal year the workload or other approved formula would yield a greater sum. After FY-99, the workload or other formula approved by the Director shall be used to determine the Cherokee Nation's allocation. The $297,600 is comprised of $33,254 of program formula for Sanitation Facilities Construction Support and Environmental Health Services Support: and $264,346 of IHS Seif-Governance funds. The funding described herein represents a negotiated settlement; the Nation does not concede that the workload formula is an appropriate method of allocating these funds.

11. The Unmet Needs funding has not been determined and will be included FY-97 in accordance with the Unmet Needs program formula. Said adjustments shall be made by way of an addendum executed by the parties.

12. In addition to the funds identified in this line item, the Nation shall be entitled to participation in any Special Projects funding during FY-97.

13. This funding shall be determined on a recurring base established by FY-96 allocations, pending resolution of any disputes regarding the method used to calculate the FY-96 allocations. By identifying and accepting this funding as "Program Formula," the Nation shall not be conceding that the formula used to establish the FY-96 base allocation was appropriate or consistent with legal requirements, or that such funding should not be allocated as tribal shares.

14. The Nation's share of Fiscal Intermediary funding pertinent to FY-97 Contract Health Services funding will be added to this AFA in accordance with Endnote (5) accordance with the provisions of said letter agreement and the attached project scope documents. Said letter agreement shall be signed by the Nation's Principal Chief and the IHS

Official designated by the Director of IHS. The total amount of the project money identified in the letter agreements shall be added to this section of the AFA and shall be made available to the Cherokee Nation within 60 days after the IHS Area Office receives the completed project documents.

16. The amounts included in the AFA for the Nation's OCAO and Headquarters tribal shares and for Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. Specifically the Nation disagrees with the decision of the IHS to utilize a "Tribal Size Adjustment" formula instead of historically applied User Population formula for resource allocation. Further, the parties agree to review OCAO and Headquarters residual resources and understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual.

17. The Nation agrees to not compact its share of OCAO RPMS budget line item under the FY-97 AFA. Presently this amount has been identified at $77,820. The Nation and OCAO have met and concluded this funding will remain with the OCAO in exchange for continued information technology support in accordance with Attachment "A". With respect to IHS Headquarters, the Nation shall receive its allocation of IHS Headquarters RPMS equipment fund, OIRM Headquarters East and OIRM Headquarters West funding in accordance with Section 12 hereof; provided, however, the parties agree that the Nation and United States may amend this AFA at a later date to provide identified products and services agreed upon with the Office of Information Resources Management and the Office of Health Program Research and Development.

18. While accepting this amount, the Cherokee Nation is not agreeing this is the total entitlement of the Tribe. The

Nation claims that it is entitled to an additional $2,240,109 for indirect cost (estimate based on the current negotiated IDC rate of 17.1%) based upon the Indirect cost rate negotiated with the Department of Interior, Office of Inspector General and the operation of that government direct program and rules. By accepting this amount, the Nation is not waiving any claim it may have to additional indirect cost funding. By signing this agreement, the IHS position is that it is not agreeing to the Nation's assertion that it is entitled to an additional amount of $2,240,109 for indirect cost.

19. Non-recurring resources to include, but not limited to the following sources will be added to the funding with an amendment to the AFA upon identification for the Nation: Deferred Service Funds and Quality Assurance Funds.

20. Any additional recurring dollars identified during FY-96 will be added to the FY-97 AFA as an addition to the Recurring Program Base Budget Funds when the IHS releases the figures.

21. See endnotes applicable to each of the funding categories identified in this Section.

20. Any additional recurring dollars identified during FY-96 will be added to the FY-97 AFA as an addition to the Recurring Program Base Budget Funds when the IHS releases the figures.

21. See endnotes applicable to each of the funding categories identified in this Section.

Dated this 24th day of July 1996.

CHEROKEE NATION	UNITED STATES OF AMERICA
By: /s/ Joe Byrd	By: /s/ Dr. Michael Trujillo
JOE BYRD	MICHAEL TRUJILLO
Principal Chief	Director of Indian Health Service
	Department of Health and Human Services

[See JA Vol. II, PART 1 for Attachments]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
918-456-0671

September 26, 1997

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act
Claim for Fiscal Year 1997 Indirect Costs

Dear Dr. Trujillo:

The Cherokee Nation hereby claims the right to immediate payment of amounts immediately due and owing to the Nation under the provisions of the Nation's 1997 Annual Funding Agreement for its Compact of Self Governance with the United States and Sec. 303(a)(6) of Title III of the Indian Self-Determination and Education Assistance Act (ISDA). This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* §§ 110(d) and 403(h) the ISDA as amended.

The amount due Cherokee Nation is TWO MILLION, SEVEN HUNDRED EIGHTY-FIVE THOUSAND, NINE HUNDRED FORTY-EIGHT DOLLARS ($2,785,948) for FY 1997 Indirect Costs. Under §303(a)(6) of Title III of the ISDA, the Nation's 1997 Annual Funding Agreement must provide the Nation funding "in the amount equal to that

which the tribe would have been eligible to receive under contracts and grants under this Act, including direct program costs and indirect costs. . ." Pursuant to that provision of the Act, and as noted in Section Sixteen, number 18 of the Nation's 1997 Annual Funding Agreement, the Nation hereby claims a contractual and statutory right to receive indirect costs based upon the Nation's 1997 indirect cost rate negotiated with the Department of Interior, Office of the Inspector General.

The Cherokee Nation understands that the Office of the Inspector General has placed a moratorium on negotiating indirect cost rates pending further proceedings in Ramah Navajo Chapter v. Lujan, now pending (on remand from the Eighth Circuit Court of Appeals) in the United States District Court of the District of New Mexico (Civ. No. 90-957 LH/W WD). This claim is therefore based upon the Nation's 1997 proposed indirect cost rate of 14.93%. The Nation reserves its right to amend this claim upon conclusion of negotiations with the Office of the Inspector General. The claim is without prejudice to any additional indirect costs that may be due to the Nation under any revised indirect cost methodology that may be adopted pursuant to any rulings, judgement, or settlement in Ramah Navajo Chapter v. Lujan.

The Nation's claim fully credits the United States for the indirect costs amounts actually paid to the Nation for Fiscal Year 1997.

In support of this claim I enclose the following documents:

(1) a worksheet prepared by the Nation showing (a) the indirect costs that were due under the Nation's 1997 Annual Funding Agreement and §303(a)(6) of the ISDA, (b) the amounts actually paid by the United States, and © [sic] the balance owed (Exhibit 1);

(2) the Nation's 1997 Annual Funding Agreement (Exhibit 2);

(3) the Nation's Fiscal Year 1997 Indirect Cost Proposal (Exhibit 3); and

(4) Copies of Payment Management System (PMS) fund transfer documents showing the indirect cost amounts actually paid to the Nation by the United States for Fiscal Year 1997.

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. § 3901 et. Seq. and the Contract Disputes Act, 41 U.S.C. § 611, interest is accruing on the amount due.

We would appreciate you prompt decision on this claim.

Sincerely,

/s/ Joe Byrd
JOE BYRD
Principal Chief

cc: Paula Williams, Director, Office of Tribal Self Governance Lloyd Miller, Esq.

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, Joe Byrd, Principal chief of the Cherokee Nation, hereby certify as follows on behalf of the Nation:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Nation believes the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Cherokee Nation.

DATED this 29th day of September 1997.

CHEROKEE NATION

By: /s/ Joe Byrd
JOE BYRD, Principal Chief

CERTIFICATE OF DELIVERY

I, Melinda Brown, swear or affirm under penalty of perjury:

1. I am an employee of the Cherokee Nation.

2. I sent the originals of this document, together with the referenced Exhibits 1 through 4, via Federal Express and certified U.S. mail to:

   Dr. Michael H. Trujillo, Director
   Indian Health Service
   Department of Health and Human Services
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

on the 29th day of September, 1997.

3. On the same date I also sent copies of the same documents, via Federal Express and certified U.S. Mail, to:

   Paula Williams, Director
   Office of Tribal Self Governance
   Indian Health Service
   5600 Fishers Lane, Room 6A-05
   Rockville, Maryland 20857

Dated this 29th day of September 1997.

DRAFT
For Discussion Purposes Only

Procedures for Allocating Prior Year Unobligated Balances to Satisfy CSC Shortfalls

I. Introduction

Each year the IHS has balances at the end of the fiscal year that remain either unobligated or are obligated but still unliquidated. These funds are tracked by sub-sub-activity and remain available for obligation by sub-sub-activity in the event that a "bonafide obligation" is presented to the IHS that requires payment. Any crossing of obligations by sub-sub-activity requires reprogramming. The balances are available for 5 years after which time they are no longer available and must be transferred to the Treasury. For example, on October 1, 1997 any balances that remained unliquidated from FY '92 were transferred to the Treasury. Balances from FY's 1993,1994,1995,1996, and 1997 would remain with IHS for obligation and liquidation.

This section provides guidance to the IHS Division of Financial Management (DFM) in obligating prior year unobligated balances to cover bonafide CSC obligations from prior years.

II. Process

a. On or before November 10 of each year, the DFM shall identify in a report the current balances in each of the five prior fiscal years by sub-sub-activity as either obligated or unobligated. Unobligated balances shall not include such things as "x-account" funds, undelivered orders, third party collections and revenue, and the reserve for workers compensation claims.

b. Reprogramming Prior Fiscal Year Balances—

1. For the fifth prior fiscal year, the DFM shall submit a reprogramming request, if necessary, to move all balances, either obligated or unobligated, into the unobligated CSC sub-sub-activity.

2. For the third and fourth prior fiscal years, the DFM shall submit a reprogramming request, if necessary, to move all unobligated balances from any sub-sub-activity, into the unobligated CSC sub-sub-activity.

3. For the first and second fiscal years, only those unobligated balances under the Contract Support Cost sub-sub-activity will be available for obligation to cover bonafide CSC obligations from prior years.

c. Each area office shall work with T/TO's in their Area to document and certify any bonafide obligations for CSC [need a definition of this] that may exist in each of the past five fiscal years.

d. On or about March 30th of each fiscal year, the DFM shall identify the [percentage of ???] documented CSC needs for each T/TO by fiscal year from item "c" above and shall attempt to fund the same level of need for each T/TO's bonafide obligation from the unobligated balance available in the CSC sub-sub-activity. (*See* items b, 1, 2, & 3 above)

e. All funding of CSC from prior year unobligated balances shall be on a one-time non-recurring basis and shall not form the basis for subsequent funding of the same costs on a recurring basis.

ATTACHMENT

OPTION 2 DRAFT Continued

Instead of using prior year unobligated balances to fund the shortfalls in existing contracts, we may wish to concentrate on funding the startup and CSC needs of T/TO's in the ISD Queue as follows:

II. Process

a. On or before November 10 of each year, the DFM shall identify in a report the current balances in each of the five prior fiscal years by sub-sub-activity as either obligated or unobligated. Unobligated balances shall not include such things as "x-account" funds, undelivered orders, third party collections and revenue, and the reserve for workers compensation claims.

b. Reprogramming Prior Fiscal Year Balances

1. For the fifth prior fiscal year, the DFM shall submit a reprogramming request, if necessary, to move all balances, either obligated or unobligated, into the unencumbered CSC sub-sub-activity.

2. For the third and fourth prior fiscal years the DFM shall submit a reprogramming request, if necessary, to move all unobligated balances from any sub-sub-activity, into the unobligated CSC sub-sub-activity.

3. For the first and second fiscal years, only those unobligated balances under the Contract Support Cost sub-sub-activity will be available for obligation to cover bonafide CSC obligations from prior years.

c. The DFM shall identify the amounts required to fully fund the Start-up Costs of each T/TO listed in the ISD Queue. These amounts shall be documented and certified as a bonafide obligation for CSC [need a definition of this] for the fiscal year in which the T/TO assumed operation of the program.

d. On or about March 30th of each fiscal year, the DFM shall identify the documented Start up needs for each T/TO by fiscal year from item "c" above. The DFM shall attempt to fund the need for each T/TO's bonafide obligation for Start-up costs in the order in which they appear in the ISD Queue from the unobligated balance available in the CSC sub-sub-activity for the corresponding fiscal year. (*See* items b, 1, 2, & 3 above)

e. All funding of CSC from prior year unobligated balances shall be on a one-time non-recurring basis and shall not form the basis for subsequent funding of the same cost on a recurring basis.

[SEAL] Office of the Secretary

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the General Counsel
Rockville, Maryland 20857

March 25, 1999

To: Director, Indian Health Service

From: Chief, IHS Branch OGC

Subject: Payment of Start-Up Costs for Self-Determination Contracts and Self-Governance Compacts Entered Into in Fiscal Years 1994-1998.

It has come to my attention that the planned distribution of the $35 Million in new funds for fiscal year 1999 for contract support costs (CSC) appropriated by the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, H.R. 4328 (Oct. 21 1998) includes payment of start-up costs for past year's contracts and compacts. Section 314 of the above cited Omnibus Appropriations Act for 1999 states in full:

> Notwithstanding any other provision of law, amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service by Public Laws 103-138,103-332,104-134,104-208 and 105-83 for payments to tribes and tribal organization for contract support costs associated with self-determination or self-governance contracts, grants, compacts, or annual funding agreements with the Bureau of Indian Affairs or the Indian Health Service as funded by such Acts, are the total amounts available for fiscal years 1994 through 1998 for such purposes, except that, for the Bureau of Indian Affairs, tribes and tribal organizations may use their tribal priority allocations for unmet indirect costs of ongoing contracts, grants, self-governance compacts or annual funding agreements.

112 Stat. 2681. Section 314 unequivocally prohibits IHS and BIA from disbursing any funds for CSC other than those funds Congress specifically made available for payment of CSC by the listed Public Laws for fiscal years 1994 through 1998, whether through statutory provisions or earmarks in committee reports. Section 314 states that these are the "total amounts available" for CSC for contracts, etc., funded by such appropriation laws for fiscal years 1994-1998. To make it clear that Section 314 operates to contain the total amounts available by law for CSC for such contracts, etc., for fiscal years 1994-1998, Section 314 begins with the phrase "[n]otwithstanding any provision of law."

CSC includes start up costs under subsection 106(a)(5) of the Indian Self-Determination and Education Assistance Act (ISDEA). 25 U.S.C. 450j-1(a)(5). Because start up costs are a subset of CSC, start up costs are covered by section 314. Furthermore, by definition, start up costs are one time costs incurred "during the initial year that a self-determination contract is in effect." *Id.* Thus, start up costs for contracts, etc., funded by the Public Laws listed in section 314 for fiscal years 1994-1998, which have remained on the queue, are CSC relating to those years. Section 314, therefore, legally precludes use of any part of the $35 million in new funds for CSC in 1999 for start up costs associated with those contracts, compacts or annual funding agreements.

I regret the timing of this legal advice which comes after considerable consultation with the tribes over how the $35 million should be distributed. However, I feel that I have no choice but to issue this memorandum advising that IHS has no legal authority to use any part of the $35 million for start up costs for contracts, grants, compacts or annual

funding agreements funded by the fiscal year 1994-1998 appropriations acts. Such payments are prohibited by law. Thus, the distribution plan for the $35 million should be revised.

/s/ Duke McCloud
DUKE MCCLOUD

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV99-092-S

CHEROKEE NATION OF OKLAHOMA; and SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

DONNA E. SHALALA, Secretary of the United States Department of Health and Human Services; and MICHAEL H. TRUJILLO, Director of the Indian Health Service, United States Department of Health and Human Services,
Defendants.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I am the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service. I have held this position for four years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) is responsible for formulating and executing the IHS budget. I have personal knowledge regarding the IHS Headquarters budget, contract support cost allocations, and reserves and past year appropriations accounts.

3. IHS' total appropriations from Congress for Indian Health Services in fiscal years 1996 and 1997 were $1,747,842,000 and $1,806,269,000, respectively. The IHS obligated all of the funds that Congress provided in its Indian Health Services appropriations for those years for programs

serving tribes, either directly or through self-determination contracts and compacts, with the exception of some minor unobligated sums.

4. The annual appropriation for Indian Health Services is structured on the basis of budget subactivities such as, Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Tribal Management, and Contract Support Costs. IHS' overall budget allocations for these various subactivities for fiscal years 1996 and 1997 are set forth in the budget tables attached as Exhibit F.

5. Congress approved these subactivities during the budget process as appropriate purposes for IHS' expenditure of the funding. IHS submitted its budget request for fiscal years 1996 and 1997 based on these subactivities for Congress' review in the so-called Congressional Justifications, by which IHS explains its portion of the President's budget request to Congress prior to the start of the fiscal year. Then, when Congress actually appropriated the money for those fiscal years, it earmarked the funds for each subactivity for which the appropriation was intended by specifically listing funding for the subactivities in its appropriation committee reports. In addition, the appropriation statutes for fiscal years 1996 and 1997 in the Administrative Provisions for the Indian Health Service stated that "the appropriation structure for the Indian Health Service may not be altered without advance approval of the House and Senate Committees on Appropriations."

6. The amounts listed in the Congressional Justifications for IHS' budget request for Indian Health Services are usually less than IHS originally sought. For example, in 1996 IHS originally sought $161,240,000 in contract support costs but ultimately was allocated only $153,040,000. Similarly, in 1997 it originally requested $173,629,000 but was ultimately only allocated $160,660,000.

7. There is a two year lead time in preparing the President's budget for any given fiscal year so that budget requests (such as for contract support costs) are based upon estimates of need made far in advance of the fiscal year for which funds are appropriated. During that process, IHS' funding requests are reviewed by the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB) and usually reduced. IHS submits its original budget request to HHS which usually reduces it because of competing interests within the Department. HHS, in turn, submits the request to OMB, which usually reduces it further due to competing interests within the Government. Finally, the request is incorporated into the President's budget request to Congress, in which IHS' request for funding is set forth in the Congressional Justifications. At that point Congress appropriates only as much money as it sees fit. In other words, IHS cannot request an unlimited amount of funding and reasonably expect ultimately to receive it from Congress.

8. However, in order to inform Congress of any shortfalls in contract support costs in IHS' budget, IHS reports those shortfalls to Congress every year. For example, IHS submitted a shortfall report which indicated a $81,996,000 shortfall in contract support costs for fiscal year 1997. In 1996 IHS did not submit a formal report but submitted information to the House and Senate Appropriations Committees indicating a $43,000,000 shortfall in contract support costs for 1996.

9. IHS allocates its annual Indian Health Services appropriation either to its Area Offices for health services programs or to its Headquarters Office for Headquarters managed activities.

10. With respect to the first of these categories, IHS distributes most of its funds to its twelve Area Offices each year for the direct operation of programs or the funding of

tribal contracts and compacts under the Indian Self-Determination Act. Most of the appropriation is allocated to the Area Offices on a recurring basis (*i.e.* based on the previous year's allocations plus inflationary increases). Tribal and IHS operated services programs are funded from the various subactivities of the appropriation discussed above, *i.e.*, Hospital and Clinics, Dental Services, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Immunization, Urban Health, Contract Support Costs, and other similar subactivities. In fiscal year 1997, IHS allocated to the Area Offices approximately $1,368,893,059 of the total approximately $1.8 billion annual appropriation on a recurring basis within the various budget subactivities. For fiscal year 1996, IHS allocated to the Area Offices on a recurring basis approximately $1,313,990,083 of the total approximately $1.75 billion appropriation.

11. The remainder of IHS' total annual lump-sum is retained each year by IHS Headquarters for Headquarters' managed activities. A portion of the retained Headquarters' funds are kept in reserve accounts and allocated on a non-recurring basis (*i.e.* toward expenses that do not occur in the same Area every year) to the Area Offices during the year as needs arise. In fiscal year 1996 IHS Headquarters retained the following reserve accounts for unanticipated, non-recurring expenses pertaining to the following categories of services: $11,571,233 for Hospitals and Clinics; $1,171,900 for Dental; $702,500 for Mental Health; $2,194,600 for Alcohol/ Substance Abuse programs; $870,000 for Public Health Nursing; $1,081,700 for Health Education; $2,295,100 for Community Health Representative programs; $494,800 for Indian Health Professions scholarship and extern programs; $277,000 for Headquarters Direct Operations; $8,665,700 for Self- Governance negotiation and shortfalls; and $9,913,900 for Contract Health Care services. In 1997 IHS Headquarters retained reserve accounts for nonrecurring allocations to Area Offices largely for these same purposes. The budget tables

setting forth the reserve account expenditures for 1996 and 1997 are attached as Exhibits G and H.

12. As those budget tables show, the reserve accounts were subdivided to pay for specific categories of services within budget subactivities. For instance, for fiscal year 1996, the $11,571,233 reserve for "Hospitals and Clinics" subactivity was further subdivided to pay for the following: $4 million for the IHS Director's Emergency Fund to pay for emergency situations that might arise throughout the national IHS health delivery system over the course of the fiscal year; $638,600 for Health Promotion/Disease Prevention (HP/DP) activities; $224,733 for Model Diabetes programs; $1,195,200 for Nursing Initiatives; $750,000 for the IHS Epidemiology Center; $1,500,000 for Collection and billing activities; $75,000 for Non-Physician COSTEP activities; $1,707,100 for Recruitment and Retention of personnel; and $1,012,500 for program evaluation. For fiscal year 1997, these Headquarters' reserve accounts were subdivided for expenditure for similar purposes.

13. As the attached budget tables show, all of the money reserved by IHS Headquarters for fiscal years 1996 and 1997 for allocation to the Area Offices on a nonrecurring basis was spent for these and the other purposes listed on the budget tables during the fiscal year, leaving a zero balance at the end of the fiscal year.

14. In addition to the reserve accounts allocated to the Area Offices on a nonrecurring basis, the remainder of the amounts retained by Headquarters were spent for Headquarters managed activities. This included approximately $15.4 million as a Headquarters residual amount which is not subject to contracting. These residual funds support inherently federal functions needed for the IHS to function as a federal agency even if all IHS programs were contracted or compacted by tribes.

15. The rest of the Headquarter's retained amounts for fiscal years 1996 and 1997 (with the exception of certain funds managed by Headquarters and specifically earmarked by Congress for particular purposes such as scholarships for individuals) were subject to contracting or compacting as tribal shares of Headquarters administrative support functions. Each tribe may contract or compact only its share of these retained funds supporting Headquarters administrative support functions. Those tribal shares which are contracted or compacted are distributed to tribal contracts and compacts. Those tribal shares for tribes served directly by the IHS are retained by Headquarters to fund administrative support services for those tribes.

16. At the end of each fiscal year there is generally a very small sum of "unobligated" money. My office becomes aware of these unobligated funds after the close of the fiscal year around mid-October when the IHS completes its accounting process for closeout of the fiscal year. In fiscal year 1996 IHS had $786,042 in unobligated funds, and in fiscal year 1997 it had $417,045. The appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account. As of the present time, all funds from those fiscal year appropriations have been spent either for IHS' direct operation of programs for tribes, or for the funding of self-determination contracts and compacts that allow Tribes to operate the programs themselves.

17. Within IHS' appropriation for Indian Health Services for fiscal years 1996 and 1997, Congress earmarked in its appropriation committee reports $153,040,000 in 1996 and $160,660,000 in 1997 to be spent on contract support costs. These contract support funds were allocated to the Area Offices for tribal contracts and compacts for fiscal years 1996 and 1997 as shown in the attached tables. Exhibit I. As explained above, reprogramming additional funds for contract

support costs would have required IHS to use money otherwise dedicated to other purposes supporting health services delivery to tribes.

18. For example, for IHS to have paid the Cherokee Nation additional contract support costs of 3.4 million in 1997, IHS would have been required to deduct $3.4 million from funding that was otherwise obligated, for example, to the diabetes program, the epidemiology center, and dental and mental health services. That money was distributed to the area offices on a recurring basis to be spent for these and other services, or it was kept in the Headquarters reserve fund for needs that arose in those categories during the year. With respect to Shoshone, IHS would similarly have been required to take away funding from other Tribes or programs in the amount of $3.5 million in order to pay Shoshone the additional contract support costs it is claiming for 1996 and 1997.

19. If IHS were required to pay the shortfalls in contract support costs requested by every Tribe that was a party to a self-determination contract or compact in fiscal years 1996 and 1997, IHS would be required to deduct approximately $125 million from amounts supporting programs for other tribes for those years.

20. Congress' finite appropriations to IHS must be divided among IHS and hundreds of Tribes or Tribal groups to pay for the operation of approximately 150 health service units throughout the United States. The 150 service units include some 500 direct health care facilities, 49 hospitals, 195 health centers, 8 school health centers, and 289 health stations, satellite clinics and Alaska village clinics. See HHS Justification of Estimates for Appropriations Committees, 1998, at 4.

21. As of 1996, IHS directly operated approximately 65% of its service units. The remaining 35% were operated by

Tribes and tribal organizations which had entered into self-determination contracts and compacts with HHS pursuant to the Indian Self-Determination Act.

22. Congress has consistently underfunded contract support costs in connection with self-determination contracts. In 1996, for example, the Secretary received requests for contract support costs for newly acquired or expanded programs that exceeded the $7.5 million allocation for that purpose by $29.2 million. Similarly, in 1997 the Tribes' requests for contract support costs for newly acquired or expanded programs exceeded the $7.5 million allocation for that purpose by $41.6 million. During those years, the remainder of Congress' lump-sum allocation for contract support costs was completely committed to the funding of already existing programs, whose contract support costs were covered by self-determination contracts with a multitude of Tribes nationwide.

23. IHS, therefore, implemented guidelines explaining how the Secretary would distribute new contract support costs in the event of such appropriations shortfalls. *See* IHS Circular 96-04; ISD Memorandum 92-2. IHS determined that it would place all requests in a queue or priority list based on date of receipt. Approved requests for contract support costs would be 100% funded on a first come first served basis. Once funds were exhausted, however, Tribes on the priority list would be provided new contract support cost funds according to the date of the individual request, when additional appropriations for contract support costs were made available. In the year a Tribe reached the top of the queue, it would be paid its new contract support costs for that year and would continue to be paid at least that amount of contract support costs for the newly funded program every year thereafter.

24. IHS developed this policy with the active participation of representatives from Indian Tribes. The procedures have been applied to self-determination contracts since 1992 and were subsequently applied to self-governance compacts. Tribal consultation has thus been an integral part of the formulation and implementation of IHS' policy. Indeed, the queue system was an alternative to a pro-rata distribution of contract support costs which many Tribes have opposed.

25. Cherokee was placed on the Indian Self Determination queue in 1996 for contract support costs for its three newly contracted health programs, with the understanding that sufficient Congressional appropriations were not presently available. In 1997 IHS had already spent its $7.5 million allotment on Tribes ahead of Cherokee on the queue for new contract support costs, and Cherokee had not yet reached the top of the queue. Thus, Cherokee did not receive any additional funding for contract support costs for those new programs in fiscal year 1997.

26. Shoshone was placed on the Indian Self determination queue in 1995 for contract support costs for its newly contracted health programs, with the understanding that sufficient Congressional appropriations were not presently available. In 1996 and 1997 Shoshone had not yet reached the top of the queue. Thus, Shoshone did not receive any additional funding for contract support costs for these new programs in either 1996 or 1997. The IHS had already allocated its $7.5 million allotment for new contract support costs to Tribes ahead of Shoshone on the queue.

27. In fiscal year 1996 IHS Headquarters allocated $14,073,600 for contract support costs to the Oklahoma Area Office (which is the Office that distributes funding to Cherokee). In fiscal year 1997, IHS allocated $18,512,000 for contract support costs to the Oklahoma Area Office. The difference is due to an additional allotment of $4,438,400 from the $7.5 million ISD fund for 1997 for an Oklahoma

tribe at the head of the queue. The chart attached as Exhibit I sets forth the 1996 and 1997 Area allocations. These contract support funds were distributed to Tribes by the Oklahoma Area Office (with the exception of the additional ISD allotment in 1997) to pay for contract support costs for existing contracted programs, *i.e.*, programs that tribes had already contracted or compacted for and not new and expanded programs for which requested contract support costs were placed on the ISD queue.

28. As noted above, the chart indicates that the Oklahoma Area Office received a $4,438,400 increase in contract support funding for fiscal year 1997. This increase was attributable to the Area Office's receipt of additional funds for "new" contract support costs in that year, *i.e.*, contract support costs for new or expanded contracted programs at the head of the queue before the Cherokee requests. Because Tribes that reach the top of the queue and receive new contract support costs received that same amount every subsequent year, the $4,438,400 in new contract support costs for fiscal year 1997 became part of the Oklahoma Office's "base" funding for existing Contract support costs for subsequent years.

29. I am advised that Cherokee was paid approximately $1.6 million in indirect contract support costs in 1996 and again in 1997 for its "existing" programs not on the queue. Cherokee's funding was not increased above that amount because Congress did not appropriate additional funding for contract support costs to the IHS for existing contracts. Furthermore, the Oklahoma Area Office did not receive an increase in allocations from the $7.5 million appropriated for the ISD Fund for that year for the "new" Cherokee programs on the queue because they were not at the head of the queue list. As explained above, if IHS had provided Cherokee with more than $1.6 million in indirect contract support costs for Cherokee's contracted programs, IHS would have had to

reduce the funds provided to other Tribes or used for Tribal programs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: 9/3/99

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

[See JA Vol. II, PART 1 for attached tables]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1286

TOMMY G. THOMPSON,
Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
04/09/03	18	PER PANEL REQUEST. COUNSEL TO PROVIDE SUPPLEMENTAL BRIEFING NOT TO EXCEED 10 PAGES. DUE IN 10 DAYS FROM THIS DATE. (EOD BY KSH ON 4/9/03) 02-1286
04/24/03		CHEROKEE NATION OF OKLAHOMA (APPELLEE)—APPELLEE'S SUPPLEMENTAL BRIEF (MS-04/24/03). FILED: 04/24/03. [032187] (EOD 04/25/03 BY JAB) 02-1286 SUPP. BRIEF & ATTACHMENTS 1-6
04/28/03	22	ORDER: THE COURT HAS DETERMINED THAT THE SECRETARY'S BRIEF IS NOT RESPONSIVE TO THE COURT'S REQUEST FOR SUPPLEMENTAL BRIEFING. THEREFORE, IT IS ORDERED THAT: THE SECRETARY SHALL SUBMIT BY COB ON 5/12/03 A REVISED SUPPLEMENTAL BRIEF

DATE	NO.	PROCEEDINGS
		DIRECTLY ADDRESSING (FS-04/28/03) RECEIVED: 04/28/03 22A. THE AMT. OF FUNDS AVAILABLE DURING EACH OF THE FISCAL YEARS 1994-1996, ETC. (EOD 04/28/03) (KSH) 02-1286
05/12/03		TOMMY G. THOMPSON. Secretary of Health and Human Services [APPELLANT] —REVISED SUPPLEMENTAL BRIEF OF APPELLANT TOMMY G. THOMPSON (MS-05/12/03). FILED: 05/12/03. [032204] (EOD 5/12/03 BY CLI 02-1286 SUPP. BRIEF & ATTACHMENT WITH EXHIBIT
07/03/03		AFFIRMED. PRECEDENTIAL OPINION BY: J. DYK. JUDGMENT ENTERED: 07/03/03. NO COSTS. OPINION SENT TO PARTIES: 07/03/03. (EOD 07/03/03 BY KSH) 02-1286
08/13/03		APPELLANT—COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC (MS-08/18/03) FILED: 08/18/03. PETITION CIRCULATED: 08/18/03. PETITION CIRCULATED: 08/20/03 EN BANC CIRCULATED: 09/02/03 PETITION/EN BANC DENIED/DENIED ON 09/12/03. (EOD 09/12/03 BY AVV) 02-1286
03/22/04		PETITION FOR WRIT OF CERTIORARI FILED 12/11/03. SUPREME COURT #: 03-853. CERT. GRANTED ON 03/22/04. (EOD 03/31/04 BY AV) 02-1286

INTERIOR BOARD OF CONTRACT APPEALS

Nos. 3877-98 through 3879-98

Appeals of CHEROKEE NATION OF OKLAHOMA,
P.O. Box 948, Tahlequah, Oklahoma 74465-0948,
Contractor-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE),
Appellee.

RELEVANT DOCKET ENTRIES

NO.	PROCEEDINGS
1.	Notice of Appeal dated January 27, 1998.
5.	Appeal File dated March 13, 1998.
6.	Appellant's Complaint dated April 17, 1998.
8.	Government's Answer dated June 17, 1998.
9.	Letter from IBCA to parties urging settlement negotiations, dated June 22, 1998.
16.	Appellant's counsel motion for partial summary judgment and accompanying memorandum in support with affidavit of authentication of documents dated January 7, 1999.
17.	Government's counsel brief supporting motion to dismiss dated December 31, 1998.

NO.	PROCEEDINGS
21.	Appellant's opposition to motion to dismiss; request for oral argument: memo in support of motion for partial summary judgment & affidavit of CHead dated February 17, 1999.
22.	Government's brief in response to motion for partial summary judgment (liability) with declarations of DJCesari and RBDeMaray dated February 18, 1999.
36.	Written Opinion: Appellant's motion for summary judgment granted: Government's motion to dismiss denied dated June 30, 1999.
37.	Letter to the Board from the Government's counsel re: Agreement not to engage in any further proceedings regarding quantum while Government proceeds to file Notice of Appeal with Federal Circuit Court dated August 12, 1999.
38.	Order deferring quantum negotiations during judicial review dated August 18, 1999.
39.	Notice of Docketing at U.S. Court of Appeals for the Federal Circuit dated November 1, 1999
41.	Letter to the Board from Appellant's counsel requesting a status conference with recommendations and attached USCAFC Order dated February 25, 2000, dated March 15, 2000.

NO.	PROCEEDINGS
45.	Government's counsel motion for leave to move for reconsideration of partial summary judgment on (liability); brief in support and declaration of CLFitzpatrick with attachments dated March 27, 2000.
48.	Order confirming agreement as to discovery and settlement negotiations dated April 26, 2000.
61.	Decision: Government's motion for reconsideration granted dated October 31, 2000.
65.	Government's supplemental brief in opposition to partial summary judgment and exhibits dated December 29, 2000.
76.	Written Opinion on Reconsideration: Appellant's Motion for Summary Judgment Granted: Government's motion for Dismissal denied dated March 21, 2001.
92.	Joint stipulation on quantum dated November 9, 2001.
93.	Order accepting the parties joint stipulation on quantum dated November 15, 2001.
94.	Notice of Docketing at the U.S. Court of Appeals for the Federal Circuit (02-1286) Tommy F. Thompson, Secretary of Health and Human Services v. Cherokee Nation of Oklahoma dated March 18, 2002.

[SEAL]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-O948
(918) 456-0671

Joe Byrd
[Illegible]
Principal Chief

James "Garland" Eagle
[Illegible]
Deputy Principal Chief

September 27, 1996

VIA FEDERAL EXPRESS
AND CERTIFIED U.S. MAIL

Dr. Michael H. Trujillo, Director
Indian Health Service
Department of Health and Human Services
5600 Fishers Lane, Room 6A-05
Rockville, Maryland 20857

Re: Enclosed Contract Disputes Act claim
For FY 1994, 1995, and 1996 Indirect Costs

Dear Dr. Trujillo:

The Cherokee Nation hereby claims the right to immediate payment of amounts immediately due and owing to the Nation under the provisions of the Nation's 1994, 1995, and 1996 Annual Funding Agreements for its Compact of Self-Governance with the United States. This claim is submitted pursuant to the provisions of the Contract Disputes Act, 41 U.S.C. Sec. 601 et seq. Sub Sec. 110(d) and 403(h) the Indian Self-Determination Act as amended.

The amounts owed to the Nation are ONE MILLION SEVEN HUNDRED SIXTY-NINE THOUSAND ONE HUNDRED FORTY-EIGHT DOLLARS ($1,769,148) for

FY 1994 Indirect Costs, TWO MILLION SEVEN HUNDRED NINETY-FOUR THOUSAND FIVE HUNDRED NINETY-FIVE DOLLARS ($2,794,595) for FY 1995, Indirect Costs, and ONE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED SIXTY-SIX DOLLARS ($1,805,266) for FY 1996 Indirect costs, for a total claim for all three years of SIX MILLION THREE HUNDRED SIXTY-NINE THOUSAND NINE DOLLARS ($6,369,009). Each of the Nation's Annual Funding Agreements have provided that the Nation would be paid at each year's negotiated indirect cost rate, and that that rate would be multiplied by the IHS base for that year to arrive at the correct dollar amount. Despite the clear terms of the AFAs, for each year the Nation was in fact paid a much smaller amount for indirect costs. Our claim is for the unpaid balance due for each year in question, and fully credits the United States for the Indirect Cost amount actually paid to the Nation each year.

In support of this claim I enclose the following documents: (1) a worksheet prepared by the Nation showing the indirect cost that was due under each MA, the amount actually funded, and the balance owed (Exhibit 1); (2) a copy of a September 6, 1996 Letter to you from our legal counsel requesting an informal resolution of the Nation's claim, and describing the claim in (Exhibit 2); (3) the Nation's FY 1994 Annual Funding Agreement, and the Addenda thereto (Exhibit 3); the Nation's FY 1995 Annual Funding Agreement, and the Addenda thereto (Exhibit 4); and (5) the Nation's FY 1996 Annual Funding Agreement, and the Addenda thereto (Exhibit 5).

Please recall that, under the terms of the Prompt Payment Act, 31 U.S.C. Sec. 3901 et. seq. and the Contract Disputes Act, 41 U.S.C. Sec 611, interest is accruing on the amount due.

We would appreciate your prompt decision on this claim.

Sincerely,

/s/ David Kingfisher md for
JOE BYRD, Principal Chief

JB:ft

cc: Paula Williams, Director, Office of Tribal Self-Governance Lloyd Miller, Esq.

CERTIFICATION
OF CONTRACT DISPUTES ACT CLAIM

I, Joe Byrd, Principal Chief of the Cherokee Nation, hereby certify as follows on behalf of the Nation:

(1) the above claim is made in good faith;

(2) the supporting data are accurate and complete to the best of my knowledge and belief;

(3) the amount requested accurately reflects the adjustment for which the Nation believes the government is liable; and

(4) I have been duly authorized to certify this claim on behalf of the Cherokee Nation.

DATED this 27th day of September, 1996.

CHEROKEE NATION
/s/ David Kingfisher md
JOE BYRD, Principal Chief

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September 6, 1996

VIA FACSIMILE AND OVERNIGHT MAIL

Dr. Michael H. Trujillo
Director
Indian Health Service
Parklawn Building
5600 Fishers Lane
Room 6-05
Rockville, Maryland 20857

Re: Cherokee Nation Annual Funding Agreements for Fiscal Years 1994, 1995 and 1996 (Our File No. 5401.53)

Dear Dr. Trujillo:

The Cherokee Nation has asked us to assist it in informally exploring a resolution with you of a funding deficiency under the Nation's Annual Funding Agreements for the past three years. Let me explain briefly the situation.

In the Cherokee Nation's 1994 Annual Funding Agreement (the first year the Nation was under self-governance with IHS), the Nation and IHS agreed that the Nation would receive indirect costs calculated at the Nation's final negotiated 1994 rate (which was 14.3 percent). This Agreement was stated in a very straightforward provision of section 6:

> The amount of funds allocated to the Nation under this Annual Funding Agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated for the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose.

Despite this fairly straightforward language the Nation ended up being paid a much smaller amount, apparently based upon some unexplained prior amount fixed in the IHS system. The Nation was not even paid based on its application of prior year's rate of 12.3 percent.

The same problem occurred in fiscal year 1995, when the Nation's final negotiated rate increased to 17.1 percent but the Nation was again only paid according to some unexplained prior amount fixed in the IHS system—again, an amount not even calculated at the Nation's 1993 rate of 12.3 percent (at that point a rate that was two years out of date). The 1995 Annual Funding Agreement stated plainly:

> The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1995.

Finally, although the Nation's proposed indirect rate in fiscal year 1996 is 14.7 percent, once again the Nation has apparently only paid the old amount—again, not even equal to the old 1993 rate multiplied by the old 1993 base. The 1996 Annual Funding Agreement states plainly:—

> The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996.

When we reviewed these documents it seemed to us that there must be some error, possibly in Headquarters, possibly in the Oklahoma Area office. The three Annual Funding Agreements could not be clearer on the obligation to pay, and they are not made subject to any IHS circulars or other policies.

The Nation's position is fairly straightforward. Their Annual Funding Agreements guarantee that they will be paid at each year's negotiated indirect cost rate, and that rate must be multiplied by the IHS base each year to arrive at the correct amount. Indeed, the whole purpose of negotiating an indirect cost rate each year with the Office of Inspector General is to determine the size of the pool which the Nation needs to run its programs, and thus the contribution the Nation needs from the Indian Health Service and every other agency that funds the Nation. Although the BIA has not always had sufficient funding to fund the Nation at 100 percent of its indirect costs, it has always provided the Nation maximum funding based upon the correct rate for each year applied to the correct base for each year. For whatever reason, it appears this has not occurred in recent years with IHS.

The Nation has specially requested that we write to you in an effort to seek an informal resolution of this matter. Toward that end, we have been instructed to send copies of this request to the Office of Tribal Self-Governance, the Office of Tribal Activities, and the Area Director. On behalf of the

Nation, we are available to meet with you during the Reno/Sparks National Self-Governance Conference where representatives of the Cherokee Nation will be in attendance. In any event, we request a. meeting with you in Tucson on September 18th, 1996 contemporaneous with the National Indian Health Board meeting.

We look forward to informal and productive discussions on this matter with you and your staff.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON

By: Lloyd Benton Miller
LLOYD BENTON MILLER

LBM: rmc

cc: Mr. Charles L. Head
Mr. Rick Kelly, Director
Dr. David Kingfisher, Executive Director
Myra M. Munson, Esq.
Ms. Paula Williams, Director
Office of Tribal Self-Governance
Mr. Doug Black, Director
Office of Tribal Activities
Mr. Randy Grinnell, Acting Area Director

FY—1994 ANNUAL FUNDING AGREEMENT ATTACHMENT 1 TO COMPACT OF SELF-GOVERNANCE BETWEEN THE UNITED STATES OF AMERICA AND CHEROKEE NATION

Section 1—Preamble.

This Annual Funding Agreement is executed by and between the United States of America and Cherokee Nation pursuant to Title III of P.L. 93-638 and is incorporated into and governed by the Compact of Self-Governance entered into between the Cherokee Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

Section 2

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact, redesign the services and reallocate funding identified within the General Budget Categories as a consolidated tribal government budget:

STANDARD INDIAN HEALTH SERVICE PROGRAMS	FY-94 DOLLARS	TOTAL DOLLARS
Hospital & Health Clinics	$6,403,560.00	
Dental Services	$ 836,409.00	
Mental Health	$ 952,035.00	
Alcohol & Substance Abuse	$ 609,532.00	
TOTAL CLINICAL SERVICES (1,2,4)		$8,801,536.00
Contract Health Services		$ 475,054.00
TOTAL CONTRACT HEALTH SERVICES (1,2,4)		475,054.00
Public Health Nursing	$ 507,074.00	
Health Education	$ 105,949.00	
Community Health Reps.	$1,505,654.00	
TOTAL PREVENTIVE HEALTH (1,2,4)		$2,118,677.00
Environmental Health Support Facility Support	$ 476,262.00	

TOTAL FACILITIES & ENVIRONMENTAL HEALTH SUPPORT (1,2,4)	$ 476,262.00
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$11,871,529.00

Section 3

The Nation is not authorized under this Annual Funding Agreement to redesign, shift or transfer any funding for services identified within the General Budget Categories which are subject to special restriction imposed by congressional directives:

CONGRESSIONAL EARMARKED PROGRAMS	FY-93 DOLLARS	TOTAL DOLLARS
Sanitation Facilities		
TOTAL CONGRESSIONAL EARMARKED PROGRAMS(3,4)		
INDIRECT TOTAL ALL PROGRAM FUNDS @ 12.3%		$ 1,460,198.00
TOTAL FUNDS		$13,331,727.00

FOQTNOTES:

1. FY'94 increases for population growth, mandatories and contract support are not included in the Funding Agreement. Funding will be adjusted when the actual FY'94 appropriation becomes available.
2. FY'94 non-recurring funds are not included in the Funding Agreement and will be adjusted when the actual FY'94 appropriation becomes available.
3. Public Law 86-121, Sanitation Facilities' Construction Funds; for regular, housing and special projects will be modified into the Funding Agreement when they become available..
4. The parties stipulate (i) that $13,331,727, the recurring base for Fiscal Year 1994 including indirect costs at (12.3%), represents an undisputed. portion of the total

funds to be provided by the Secretary pursuant. to Article IV, Section 3, of the Compact of Self-Governance; (ii) that additional funds are to be provided for under this Annual Funding Agreement; but (iii) that the parties are presently unable to agree on the amount of the additional funds and before the deadline imposed by Section 6 of this Annual Funding Agreement, execute an addendum hereto setting forth the amount of additional funds to be provided pursuant to this Annual Funding Agreement. The parties further stipulate that neither party accepts the methodology used by the-other in arriving at the amounts to be provided by the Secretary under the Compact and this Annual Funding Agreement.

Section 4—Services not Covered by this Agreement. The following services are not included within this Annual Funding Agreement:

—Headquarters East—All services, excluding Cherokee Nation's share of Assessments/Supply and Service Funds.

—Headquarters West—Data Processing Service Center, RPMS technical and training functions, non-recurring identified resourced programs.

—Oklahoma: city Area Office—RPMS Computer technical support, training personnel, travel and .equipment.

—Contracts retained under P.L. 93-638—Sallisaw Equipment Acquisition Management, Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian contract—Regional Adolescent Treatment Center.

The, Nation retains-the right to negotiate with the Secretary under the provisions of P.L. 93-08, as amended to include such services in the Annual Funding Agreement at a later date.

Section 5—Items of Dispute and Items and issues in dispute will be listed in and- be a part of the Annual Funding Agreement. A decision on the disputed issue(s) will be made by the Secretary no later than 30 calendar days after the negotiation date. If the decision is in favor of the Nation, the funding will be added to the annual funding agreement. The formal written decision will be filed and become a part of the Annual Funding Agreement.

Section 6—Indirect Cost Funding. The amount of funds allocated to the Nation under this annual funding agreement for indirect costs shall be established and paid based upon determination of the actual rate that is negotiated foe the current Self-Determination contracts, grants and subject to the availability of appropriations for this purpose.

Section 7—Adjustments due to Congressional Actions. The parties agree that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation notified of such actions. It is recognized there may be variances which may need to be renegotiated. Each party agrees to correct such variances as they are identified and notify the other party.

Section 8—Previous P.L. 93-638 contracts/grants funds. Under the terms of this agreement, funds remaining from previous P.L. 93-638 contracts/grants, at the effective date of this agreement, are to be expended according to the terms of this compact and are not subject to he previous contracts/grants.

Section 9—No Limits or Reductions in Services to other Tribes. Pursuant to Section 306 of P.L. 93-618, as amended. nothing in this Annual Funding. Agreement limits or reduces in any way services that any other Indian tribe or tribal organization is eligible to receive.

DATED THIS 30 DAY OF JUNE, 1993.

CHEROKEE NATION

/s/ Wilma P. Mankiller
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

By: /s/ [illegible]
Director, Indian Health Service
Department of Health and Human Services

DEPARTMENT OF HEALTH & HUMAN SERVICES

[SEAL]

Public Health Service
Indian Health Service
Rockville MD 20857

TO: Acting Director
Through IHS/OD/OHQO

FROM: Acting Director
Office of Tribal Self-Governance

SUBJECT: Request Approval of Addendum to FY-1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance with the Cherokee Nation of Oklahoma)

ISSUE

I have attached the Addendum to the fiscal year (FY) 1994 Annual Funding Agreement (Attachment I to Compact of Self-Governance with the Cherokee Nation of Oklahoma). We met with the Nation on July 13, 1993, to resolve funding issues related to tribal shares of Indian Health Service (IHS) Area and Headquarters Offices.

DISCUSSION

On June 30, 1993, the IHS signed the compact and funding agreement submitted by the Nation.

The Nation has submitted the attached Addendum to their signed compact and funding agreement that addresses revisions that reflect the negotiated Area Office and Headquarters tribal shares. A further addendum to the FY 1994 Funding Agreement will be made within 30-45 days following the execution of this Addendum resolving the Nation's share of the inventory of the Ada Warehouse.

RECOMMENDATION

I recommend that you sign the attached Addendum to be made a part of and incorporated into the 1994 Funding Agreement.

DECISION

/s/MICHEL E. LINCOLN
Approved Disapproved

Date JUN 30, 1993

/s/ DOUGLAS BLACK
DOUGLAS BLACK

ADDENDUM TO FY-1994 ANNUAL FUNDING AGREEMENT (ATTACHMENT 1 TO COMPACT OF SELF-GOVERNANCE BETWEEN UNITED STATES OF AMERICA AND CHEROKEE NATION)

WHEREAS, on the 30th day of June, 1993, the United States of America ("U.S.") and Cherokee Nation ("CN") executed the FY-1994 Annual Funding Agreement ("1994 Funding Agreement") pursuant to the "Compact of Self - Governance between the United States of America and Cherokee Nation ("Compact"); and

WHEREAS, in negotiating the 1994 Funding Agreement, the US and CN were able to agree to a certain portion of the total funds to be delivered by the Secretary pursuant to Article IV, Section 3, of the Compact, but were unable to agree to the balance of the total funds to be so delivered, as noted in footnote 4 of the 1994 Funding Agreement; and

WHEREAS, the parties have successfully negotiated the balance of the total funds to be delivered by the Secretary pursuant to Article IV, Section 3, of the Compact, except for Cherokee Nation's share of the Ada Warehouse inventory and have agreed to memorialize their agreement in this Addendum.

NOW, THEREFORE, the US and CN agree as follows:

Section 1:

This Addendum shall be and is made a part of, and incorporated into, the 1994 Funding Agreement, and as such further incorporated into the Compact in accordance with Section 1 of the 1994 Funding Agreement.

Section 2:

In addition to the direct program funds previously agreed to between the parties hereto in the 1994 Funding Agreement, dated June 30, 1993, the US and CN stipulate and agree that for the purposes of the FY 1994 Funding Agreement, CN will receive as its tribal share of the IHS Oklahoma City Area and

National Offices, the sum of $2,300,000, plus the appropriate indirect costs as set forth in Section 6 of said FY 1994 Funding Agreement. The parties agree that $1,245,910 from the Oklahoma City Area Office and Headquarters budgets is the amount that the IHS would be reasonably able to make available through restructuring and downsizing during FY 1994. The remaining $1,054,090 will be provided by self-governance shortfall funding appropriated by the Congress. Said sums shall be made available upon the enactment of the Department of Health and Human Services 1994 Appropriations Bill. *See* Footnote (1)[1].

Section 3:

The parties further agree that Section 4 of the June 30, 1993, Funding Agreement should be, and is, amended to read as follows:

> Section 4—Services not Covered by this Agreement. The following services-are not included within this Annual Funding Agreement:
>
> Headquarters West-Data Processing Service Center, RPMS technical and training functions, non-recurring identified resourced programs.
>
> Oklahoma City Area Office-RPMS Computer: technical support, training, personnel, travel and equipment.
>
> Contracts retained under P.L. 93-638-Sallisaw Equipment Acquisition Management, Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian Contract-Regional Adolescent Treatment Center.

[1] The parties agree that $2,300,000 represents a compromised amount, and that in stipulating to this sum neither party accepts the method or formula of allocation proposed or used Continued: by the other. The parties further agree that the amounts agreed to herein are intended to be in addition to, and not in lieu of, the amounts previously agreed to in the 1994 Funding Agreement dated June 30, 1993, and that all amounts in this Addendum and said FY 1994 Funding agreement apply only to funding for Fiscal Year 1994.

The Nation retains the right to negotiate with the Secretary under the provisions of P.L. 93-638, as amended, to include such services in the Annual Funding Agreement at a later date.

Section 4:

The US and CN agree that, in the 30-45 day period following the execution of this Addendum, they will enter into a further addendum to the FY 1994 Funding Agreement, resolving the CN's share of the inventory of the Ada Warehouse.

Section 5:

Except as provided in this Addendum, all other provisions of the FY 1994 Funding Agreement, dated June 30, 1993 shall remain unchanged.

DATED THIS 23 DAY OF AUGUST, 1993.

CHEROKEE NATION

/s/ Wilma P. Mankiller
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

/s/ [ILLEGIBLE]
Director, Indian Health Service
Department of Health and Human Services

SECOND ADDENDUM TO THE FY 1994 ANNUAL FUNDING AGREEMENT (ATTACHMENT I TO THE COMPACT OF SELF-GOVERNANCE BETWEEN THE CHEROKEE NATION AND THE UNITED STATES OF AMERICA)

This Second Addendum to the FY 1994 Annual Funding Agreement dated June 30, 1993 (hereinafter, "Funding Agreement"), which is an attachment to the Compact of Self-Governance by and between Cherokee Nation and the United States of America dated June 30, 1993, is entered into by and between Cherokee Nation and the United States of America on this 27th day of September, 1993.

1. In addition to the funds previously agreed to between the parties hereto in the Funding Agreement, dated June 30, 1993 including the addendum incorporated into the Compact of Self-Governance of even date, the US and CN stipulate and agree that the share of the IHS operated Ada warehouse inventory is the sum of, One hundred sixty-four thousand six hundred and seventy-two dollars, ($164,672), and that said sums shall be made available to the Cherokee Nation upon the enactment of the Department of Health and Human Services 1994 Appropriations, and that said sums shall applied to funding for Fiscal Year 1994. The parties hereto further agree that the sum to be paid to Cherokee Nation pursuant to the previous paragraph (to wit, $164,672.00) is intended to be in addition to, and not in lieu of, the amounts previously agreed to in (1) the FY 1994 Funding Agreement, and (2) the First Addendum to said Funding Agreement dated August 23, 1993.

2. Funding allocations for costs associated with Cherokee Nation engaged IPA/MOA personnel for Fiscal Year 1994 shall be as follows: The IHS and the Nation shall determine, based on previous year experience, the expected savings resulting from "position lapse funding" (unexpended funds due to staff turnover occurring during FY-94, $30,000.00).

The expected savings shall be made available to the Nation no later than October 1. During the last month of FY-94 (September) when actual costs are known, adjustments in funding will be made accordingly.

3. The Nation may in its discretion continue to purchase drugs, medical and other supplies from the Ada regional warehouse and the IHS office of Self-Governance shall provide a line of credit for any such purchases, based on a dollar amount the Nation estimates its quarterly usage to be. On a quarterly basis the IHS will invoice the Nation for actual purchases and thereafter reimburse the Ada warehouse accordingly.

4. The parties further stipulate and agree that the meaning of Section I of Article II of the Compact of Self-Governance between the parties hereto is clarified to reflect that all programs, services and/or activities of contracts and grants entered into pursuant to P.L. 93-638 were and are to be conducted, furnished and/or performed without interruption during the remainder of FY 1993 up to the effective dates of the Compact of Self-Governance and Funding Agreement. For purposes of said programs, services and/or activities, the effective dates of the Compact of Self-Governance and the Funding Agreement are intended by the parties to be September 30, 1993. Furthermore, to the extent that any funds previously obligated under such contracts and grants are unexpended as of said effective date, the parties hereto intend that such unexpended funds shall be deobligated from such contracts and grants and reobligated to the Compact of Self-Governance and the Funding Agreement in order to fund the programs, services and activities to be conducted, furnished and/or performed as provided therein.

5. The parties also stipulate and agree that an additional sum of $4,005,051 is hereby obligated to the Funding Agreement to be expended on the programs, services and activities

conducted, furnished and/or performed hereunder for FY 1993 pursuant to paragraph 4 of this Addendum.

6. To the extent that any funds obligated to the Compact of Self-Governance during FY 1993 as stated in paragraphs 4 and 5, above, remain unexpended as of the end of said fiscal year, such unexpended funds shall be reobligated to, and expended pursuant to, the terms of the Compact of Self-Governance and Section II of the Funding Agreement between these parties. Such reobligated funds shall be in addition to the funding provided for in the Funding Agreement.

DATED THIS 30th DAY OF SEPTEMBER, 1993.

CHEROKEE NATION

By: /s/ Wilma P: Mankiller,
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA
By: /s/ [illegible]
Director, Indian Health Service
Department of Health and Human Services

ADDENDUM NO. 3 TO THE FY 1994
Annual Funding Agreement
Between
THE UNITED STATES OF AMERICA
and
THE CHEROKEE NATION

This Addendum No. 3 ("Addendum") to the FY 1994 Annual Funding Agreement ('FY 1994 A.F.A.") between the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services ("DHHS"), and Cherokee Nation ("Nation") is entered into pursuant to the provisions of Title III of P.L. 93-638, as amended.

Recitals

WHEREAS, the IHS has apportioned FY 1994 Recurring Base Funding for the staffing for the newly-constructed and expanded Stilwell Ambulatory Outpatient Health Center, in the amount of $1,347,000; and

WHEREAS, the IHS has apportioned FY 1994 non-Recurring Funding to repair, improve and maintain Cherokee Nation Facilities, in the amount of $104,000; and

WHEREAS, the Nation desires to include the funding for these programs and projects under the provisions of its self-Governance Compact with IHS/DHHS executed on June 30,1993, by way of this Addendum to its FY 1994 A.F.A. with IHS/DHHS executed by these parties on said date in connection with said Compact,

NOW, THEREFORE, the parties agree that the FY 1994 A.F.A. should be amended as follows:

Purpose of Addendum

The purpose of this Addendum is to amend the FY 1994 A.F.A. by and between the Nation and the DHHS, pursuant to and in accordance with the Compact of Self Governance executed by said parties, by providing additional FY 1994

funding in connection with two projects for which funding was not provided under said Annual Funding Agreement. Except as expressly modified by this Addendum, the parties hereby agree that the provisions of the FY 1994 A.F.A. as modified or amended by previous Addenda, shall remain unchanged, in full force and effect, and shall apply to the additional funding and projects described in this Addendum.

Amendments to FY 1994 Annual Funding Agreement

The Nation and DHHS agree that the FY 1994 A.F.A. as amended by previous Addenda, should be, and hereby is, amended to provide additional funding in connection with the Stilwell Ambulatory Outpatient Health Center, as follows:

1. Section 2 of the FY 1994 A.F.A. as amended by previous Addenda, is hereby amended to increase the dollar amount of the "Hospital & Health Clinics" line item by the sum of $1,347,000, in order to provide additional FY 1994 recurring-base funding to the Nation for staffing the newly-constructed and expanded Stilwell Ambulatory Outpatient Health Center.
2. Section 2 of the FY 1994 A.F.A. as amended by previous Addenda, is hereby further amended to include the sum of $104,000, in order to provide FY 1994 non-recurring-base funding to the Nation for repair, improvement and maintenance of Cherokee Nation facilities as follows:

Routine Maint.: Benchstock/Serv. Cont/Equip. Replacement	$32,000.00
Local Projects and Training	$3,000.00
M&I Construction Contracts	$65,000.00
Substance Abuse Program	$4,000.00
Total	$104,000.00

The Nation and DHHS further stipulate and agree that the Secretary shall make the foregoing-described additional

amounts available to the Nation pursuant to Article IV, Section 4, of the Compact of Self-Governance.

Dated this 26th day of SEPTEMBER, 1994.

UNITED STATES OF AMERICA

By: [illegible]
Director, Indian Health Service
Dept. of Health and Human Services

CHEROKEE NATION

/s/: Wilma P. Mankiller
WILMA P. MANKILLER, Principal Chief

DEPARTMENT OF HEALTH & HUMAN SERVICES
[SEAL]
Date March 3, 1994
From OCA/DFM
Subject Additional Funds for Cherokee Nation Compact
TO James P. Dunnick, Jr., Director
Division of Resources Management
Office of Administration and Management
Parklawn Building, Room 5A-54
5600 Fishers Lane
Rockville, MD 20857

The Oklahoma Area was given FY-94 recurring funds for the staffing of the new facility at Stilwell, OK. The Stilwell Clinic will be included in the Cherokee Nation Self-Governance compact. We request the funds be reduced from the Oklahoma Area and added to the Cherokee Nation Compact. The funds are as follows:

Hospitals and Clinics	863,000.
Dental	229,000.
Mental Health	132,000.
Total Clinical Services	1,224,000.
Public Health Nursing	123,000.
Grand Total	1,347,000.

Also $104,000. of non-recurring 75x0391 Repair, Improvement and Maintenance funds have been identified for the Cherokee Nation compact. These funds also need to be reduced from the Oklahoma Area.

If additional information is required, please call Marian Mitchell at (405) 945-6850.

/s/ Denis D. West
DENIS D. WEST, Director
Division of Financial Management
Oklahoma City Area IHS

cc: REUBEN HOWARD
Acting Director, Self-Governance, Room 6-22

FISCAL YEAR 1995
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P. L. 93-638 as amended by P.L. 100-472. This AFA is incorporated into and governed by the Compact of Self Governance entered into between the Cherokee Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact, redesign the services and reallocate funding identified within the following General Budget Categories as a consolidated tribal government budget:

		1995 Totals
1. Clinical Services		
Hospital & Health Clinics	9,058,178	
Dental Services	1,550,254	
Mental Health	1,237,648	
Alcohol & Substance Abuse	615,976	
Total Clinical Services (1),(2)		$12,462,056
2. Contract Health Services (1),(2),(3),(4),(5)		$2,034,257

3. Preventive Health Services		
Public Health Nursing	$867,089	
Health Education	$161,646	
Community Health Representatives	$1,477,980	
Total Preventive Health Services (1),(2)		$2,506,715
4. Contract Support Costs (1),(2)		$473,077
TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS		$17,476,105

SECTION THREE
PROGRAM FORMULA FUNDING

Sanitation Facilities Support (6)	$590,071	
RPMS (7)	$263,399	
Equipment Replacement	$451,329	
Unmet Need (8)	$ 19,460	
Continuing Education (9)	$ 17,000	
M&I (10)	$ 85,325	
TOTAL PROGRAM FORMULA FUNDING (CENTRAL OFFICE)		$1,426,584

SECTION FOUR
CONGRESSIONALLY-EARMARKED FUNDING

The Nation is not authorized under this Annual Funding Agreement to redesign, shift or transfer any funding for the following services identified within the General Budget Categories which are subject to special restriction imposed by congressional directives:

Sanitation Facilities Construction (11)
Total Congressional Earmarked Funding (11) $_____

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

The Nation is authorized to accept the funding for services previously provided by the Oklahoma Area Indian Health Service. Additionally, the United States shall furnish funding

to the Cherokee Nation from Central Headquarters funds and the Cherokee Nation may reallocate, shift or transfer any such funding as a consolidated tribal government budget. The total amount set forth below represents a compromised figure for its Tribal Share. Although Cherokee Nation agrees to accept this amount as a share of the Oklahoma Area and Central Headquarters budgets, it does not agree that this amount represents its true share of said budgets.

Central Headquarters Tribal Share	$2,134,569
OKC Area Office Tribal Share	$ 500,000
Total Oklahoma City Area and Headquarters Tribal Share (12)	$2,634,569

SECTION SIX
INDIRECT COST FUNDING

The amount of funds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1995. The following amount assumes an agreed to rate of 14.5%.

Indirect Cost All Program Funds @ 14.5%	$3,122,909

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to Cherokee Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,476,105
Program Formula Funding	$ 1,426,584
Congressionally Earmarked Funding	$
Tribal Shares-Area and Central HQ Offices	$ 2,634,569
Indirect Cost Funding	$ 3,122,909
Total FY 1995 Funding	$24,660,167

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore and Hastings Hospitals—Inpatient Medical Services in Claremore and Hastings Service Units and associated Direct and Contract Health Services; outpatient clinics located in Claremore and Hastings hospitals; and the administrative support for all such services at the Oklahoma Area and Headquarters administrative levels.

Contracts retained under P.L. 93-638—Stilwell Equipment Acquisition Administrative, Sallisaw Construction, Stilwell Construction, Stilwell Equipment Acquisition Management. Buy-Indian contract for Regional Adolescent Treatment Center.

The Nation reserves the right to negotiate with the Secretary under the provisions of P.L. 93-638, as amended, to include such services in the Annual Funding Agreement at a later date.

SECTION NINE
ITEMS OF DISPUTE

Items and issues in dispute will be listed in and be a part of the Annual Funding Agreement. A decision on the disputed issue(s) will be made by the Secretary no later than 30 calendar days after the negotiation date. If the decision is in favor of the Nation, the funding will be added to the Annual Funding Agreement. The formal written decision will be filed and become a part of the Annual Funding Agreement.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be made due to Congressional action. Upon enactment of relevant Appropriations Acts, the amount will be adjusted as necessary and the Nation notified of such actions. It is recognized there may be variances which may need to be renegotiated. Each party agrees to notify the other party as such variances are identified.

SECTION ELEVEN
PREVIOUS P.L. 93-638 CONTRACTS/GRANTS FUNDS

Under the terms of this agreement, funds remaining from previous P.L. 93-638 contract/grants, at the effective date of this agreement, are to be expended according to the terms of this compact and are not subject to the provisions of said contracts/grants except as expressly provided in this AFA or any amendment or addendum hereto.

SECTION TWELVE
PAYMENT

The parties agree that the Secretary shall fund this AFA in quarterly installments, except for specific line items where funding is made available on a reimbursable or other programmatic basis.

SECTION THIRTEEN
ENDNOTES

1. Fiscal Year 1995 increases for population growth, mandatories and contract support are not included in this AFA. Funding will be adjusted when the actual FY 95 appropriations become available. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future congressional action.

2. Fiscal Year 1995 non-recurring funds are not included in this AFA and will be included herein by way of addendum when actual FY 1995 appropriations become available.

3. Fiscal Year 1995 Outpatient Contract Health Service Funding is now included in this AFA. Both parties agree that the Nation's 1995 share to be included in this AFA, and

subject to adjustment based upon actual appropriations, is $1,535,450.

4. The parties agree that Cherokee Nation will provide Contract Health Service resources only for eligible Indian people residing in the service areas of the Redbird Smith, Wilma P. Mankiller, Nowata, Salina and Delaware district health centers who have been referred by staff at said facilities to contract vendors for a higher level of ambulatory/diagnostic care. Further, the parties acknowledge that the contract health services funding provided for in this AFA represent funds which IHS has allocated to said facilities and not the W. W. Hastings or Claremore Service Units.

5. All requests and documentation for Contract Health Service Deferred Services resources will be sent directly to IHS Headquarters East for funding determination and will be included in this AFA by way of further addenda executed by the parties.

6. Cherokee Nation has calculated this figure to be $662,752. Therefore, the parties agree to review this figure in good faith to determine whether it was calculated correctly in accordance with the IHS's allocation formula.

7. RPMS funds include $97,701 in computer technical support and training. In the event the parties are unable to agree on a buy-back rate or arrangement within 60 days of execution hereof, this AFA may be modified to delete such support and training funds.

8. The Unmet Needs figure is an approximation only, and may be adjusted in FY 1995 in accordance with the Unmet Needs program formula.

9. This figure is computed at the rate of $200 per registered nurse, $600 per dentist and $1000 per physician.

10. In addition to the funds identified in this line item, the Nation shall be entitled to participate in Special Projects funding during FY 1995.

11. Public Law 86-121, Sanitation Facilities Construction funds, for regular, housing and special projects will be modified into the AFA by way of addendum when such funds become available.

12. The funds identified herein were calculated by IHS using the same residual and categorical line-item assumptions which IHS utilized in FY 1994. Provided, however, the amounts included in the AFA for the Nations Area Office and Central Headquarters tribal shares and Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. The IHS shall initially provide 90 percent of the negotiated amount for IHS Central Headquarters tribal share, and prior to the completion of the FY 1995 AFA the remaining 10% of such share shall be provided as resources become available resulting in a 100% funding of such negotiated tribal share in FY 1995. Further, the parties agree to review Headquarters residual resources and understand that the funding may change in FY 1996.

DATE THIS 30th DAY OF JUNE, 1994.

CHEROKEE NATION

/s/ [illegible]
Wilma P. Mankiller
Principal Chief

UNITED STATE OF AMERICA

/s/ [illegible]
Dr. Michael Trujillo
Director of Indian Health Service
Department of Health and Human Services

ADDENDUM NO. 3 TO THE FY 1995
ANNUAL FUNDING AGREEMENT
Between
THE UNITED STATES OF AMERICA
and
THE CHEROKEE NATION

This Addendum No. 3 ("Addendum") to the FY 1995 Annual Funding Agreement, as amended ("Amended FY 1995 AFA"), is entered into by and between the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services ('DHHS"), and Cherokee Nation ("Nation"), pursuant to the provisions of 25 U.S.C. §450 *et seq*.

Recitals

WHEREAS, the parties have determined that certain line items in Sections Two, Three, and Five of the Amended FY 1995 AFA require adjustments in funding levels; and

WHEREAS, the parties have agreed that the said adjustments and additional finding should be reflected in this Addendum modifying the Amended FY 1995 AFA and that AFA, as amended herein, should be subject to the provisions of the Compact of Self-Governance executed by these parties on June 30th 1993.

NOW, THEREFORE, the parties agree as follows:

Purpose of Addendum

The purpose of the Addendum is to amend the Amended FY 1995 AFA, by adjusting the funding amounts resulting from mandatory increases for General Budget Categories; adjust Contract Health Services (Section Two, item 2 of the Amended FY 1995 AFA) and clarifying the respective responsibilities of the Nation and IHS in regard to Contract Health Service; and to provide additional non-recurring funding available to the Nation for Fiscal Year 1995 (FY '95). Except as expressly modified by this Addendum, the

parties hereby agree that the provisions of the Amended FY 1995 AFA shall remain unchanged, in full force and effect.

Amendments to Section Two of the
Amended FY 1995 AFA

Section two of the Amended FY 1995 AFA is hereby amended to adjust the funding amounts in the line items under the "General Budget Categories" set forth therein and provide funding for certain non-occuring programs, project and activities not identified in said AFA. Section Two is amended to read as follows:

Section Two
General Budget Categories

The Nation is authorized to plan, conduct, consolidate, administer and, subject to the terms of the Compact of Self-Governance, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the General Budget Categories as a consolidated tribal government budget:

	STANDARD INDIAN HEALTH SERVICES	Original	Change	Revised
1	Clinical Services			
	Hospital and Clinics	9,058,178	113,493	9,171,670
	Dental Services	1,550,254	30,953	1,581,207
	Mental Health	1,237,648	17,152	1,254,800
	Alcohol & Substance Abuse	615,976	14,109	630,085
	Total Clinical Services	12,462,056	175,706	12,637,762
2	Contract Health Services (1)	2,034,257	(33,655)	2,000,602
3	Preventive Health Services			
	Public Health Nursing	867,089	9,904	876,993
	Health Education	161,646	1,654	163,300
	Community Health Representatives	1,477,980	33,090	1,511,070
	Total Preventive Health Services	2,506,715	44,648	2,551,363

4	Contract Support Costs	473,077		473,077
	Total Standard Indian Health Service Programs	17,476,105	186,699	17,662,804

NON-RECURRING RESOURCES:

CHS Medical Deferred	17,585
CHS Dental Deferred	1,700
CHS Non-Recurring	7,333
HIV/AIDS	1,875
Diabetes Camp	3,000
Continuing Education Dental	16,866
Continuing Education Nursing (HQ)	3,400
Dental Equipment Replacement	6,908
Total Non-recurring Funds	58,667

Amendment to Section Three of the Amended FY 1995 AFA

The line item for Sanitation Facilities Support is hereby amended from $590,071 to $591,317, an increase of $1,246. The line item for M&I is hereby amended from $85,325 to $80,000, a decrease of $5,325. The new total for Section Three, Program Formula Funding, reflecting the adjustments, should read as follows:

Total Program Formula Funding (CENTRAL OFFICE) $1,422,505

Amendments to Section Five of the Amended FY 1995 AFA

The line item for the Nation's compacted tribal share of the Oklahoma City Area Office is hereby amended from $500,000 to $484,575, a decrease of $15,425. This decrease is the result of administrative and conference reductions. The new total for Section Five, Tribal Share of Oklahoma City Area and Headquarters Offices, reflecting the adjustment, should read as follows:

Total Oklahoma City and Headquarters Tribal Share(12) $2,619,144

Additional Amendments to the Amended FY 1995 AFA

1. Contract health Provisions

   As a result of the $125,000 decrease in Contract Health Services funding associated with emergency room ,visits (see Endnote 1). The parties to this Addendum further agree as follows:

   a) Cherokee Nation will serve all CHS eligible out-patients in the Nation's service area.

   b) IHS will provide emergency services for both IHS and Nation's service area.

   c) IHS will assist in on-site training of Nation's CHS staff and coordinate with providers to ensure appropriate referrals between the two systems.

   d) Both parties will keep patient care as top priority in this partnership, maintain open lines of communication between staff, and focus on timely actions for referrals.

2. Cherokee Nation's Share of Fiscal Intermediary

   The Nation's share of the Fiscal Intermediary Contract has been identified for FY '95 at $72,165 and is hereby added by this amendment.

3. Retention/Bonus Pay

   The Nation's cost for payment of retention/bonus pay for FY '95 is $165,000 and is hereby reimbursed by this amendment.

ENDNOTES

1. The funding identified in the line item "Contract Health Services" (see Section 2) was determined as follows: FY 1995 "mandatories" and administrative procurement and conference reductions resulted in a net increase over the original amount of $2,034,257 by $50,303, or $2,084,560.

This figure was reduced by $125,000 down to $1,959,560, reflecting a compromise reduction for certain emergency room visits for which the Nation did not compact with IHS. The figure of $1,959,560 was further adjusted by an increase of $41,042, the sum of additional Contract Health Services funding ($29,995) plus unmet need funding ($11,047), resulting in a final funding level of $2,000,602.

Entered into on this ___ day of _____ 1995.

Cherokee Nation	United States of America
/s/ Joe Byrd	/s/ _____
HONORABLE JOE BYRD	Dr. Michael E. Trujillo
Principal Chief	Director
	Indian Health Service
	Department of Health and Human Services

FISCAL YEAR 1996
ANNUAL FUNDING AGREEMENT
BETWEEN
THE UNITED STATES OF AMERICA
AND
CHEROKEE NATION

SECTION ONE
PREAMBLE

This Annual Funding Agreement (AFA) is executed and entered into by and between the Cherokee Nation (the Nation) and the United States of America pursuant to the Indian Self-Determination and Education Assistance Act P.L. 93-638, as amended. This AFA is incorporated into and governed by the Compact of Self Governance entered into between the Nation and the Secretary of the Department of Health and Human Services on October 1, 1993.

SECTION TWO
GENERAL BUDGET CATEGORIES

The Nation is authorized to plan, conduct, consolidate, administer, and, subject to the terms of the Compact, redesign the following programs, activities and services, and to reallocate and expend the funding identified within the following General Budget Categories as a consolidated tribal government budget:

1. Clinical Services:	1996 Totals
Hospital & Health Clinics	9,171,670
Dental Services	1,581,207
Mental Health	1,254,800
Alcohol & Substance Abuse	630,085
Total Clinical Services (l), (2), (3), (4)	$12,637,762
2. Contract Health Services (l), (2), (5), (6), (7)	$ 1,959,560

3. Preventive Health Services:	
Public Health Nursing	$ 876,993
Health Education	$ 163,300
Community Health Representatives	$ 1,511,070
Total Preventive Health Services (1), (2), (3), (4)	$ 2,551,363
4. Contract Support Costs (1), (2)	$ 477,885
Total Standard Indian Health Service Programs	$17,626,570

SECTION THREE
PROGRAM FORMULA FUNDING

The following services, programs or activities shall be funded as "Program Formula" funding:

Environmental Health Support	$ 757,969
Management Initiative Fund (Hdqtrs) (17)	$
RPMS(8),(9)	$
Unmet Need (8),(10)	$
Continuing Education(8),(11)	$
M & I (8),(12)	$
Total Program Formula Funding	$ 757,969

SECTION FOUR
CONGRESSIONALLY—EARMARKED FUNDING

Funding for the following programs, activities or services shall be furnished to the Nation and expended in accordance with the specific purposes expressly stated in federal legislation:

Sanitation Facilities Construction (13)	$_____
Total Congressional Earmarked Funding (13)	$

SECTION FIVE
TRIBAL SHARE OF OKLAHOMA CITY AREA AND HEADQUARTERS OFFICES

Subject to the provision of Section Twelve of this AFA, the United States shall make available to the Nation its "tribal shares" of the IHS Oklahoma City Area Office (OCAO) and the IHS Central Headquarters budgets in the amounts identified in this Section below. The Nation is authorized to expend, reallocate, shift or transfer any or all of such funding and administer same as a consolidated tribal government budget. The finding identified below as the Nation's tribal share of the OCAO and Headquarters budgets represents a compromise between the Nation and the United States in light of conflicting views as to the amounts to be made available for tribal share allocation, the percentages of the Nation's share compacted, and the formulas used to allocate tribal share funding among the tribes. By accepting such finding, the Nation is not agreeing that it is an accurate allocation of its true tribal share of the OCAO or Headquarters budgets. The parties hereby agree to review the OCAO and Headquarters determination of their respective residual resources. The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution during FY 1996, in which case the Nation's share of such additional funding shall be identified in an addendum hereto and made available to the Nation.

Central Headquarters Tribal Share (15),(16)	$1,624,707
OEHE Headquarters Tribal Share (14),(15)	$
OKC Area Office Tribal Share (15),(16)	$ 659,558
Total Oklahoma City Area and Headquarters Tribal Share	$2,284,265

SECTION SIX
INDIRECT COST FUNDING

The amount of finds allocated to the Nation under this Annual Funding Agreement for Indirect Cost Funding shall be established and paid based upon the Nation's approved Indirect Cost Agreement for 1996. The following amount assumes an agreed rate of 19.5%, which shall also apply to additional funding identified in any future addendum(s) to this AFA.

Indirect Cost All Program Funds @ 19.5%	$4,030,417

SECTION SEVEN
SUMMARY OF FUNDING

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,626,570
Program Formula Funding	$ 757,969
Congressionally Earmarked Funding	$
Tribal Shares—OCAO and Central HQ Offices	$ 2,284,265
Indirect Cost Funding	$ 4,030,417
Total FY 1996 Funding (18)	$24,699,221

SECTION EIGHT
SERVICES NOT COVERED BY THIS AGREEMENT

The following services are not included within this Annual Funding Agreement:

Claremore and Hastings Hospitals—Inpatient Medical Services in Claremore and Hastings Service Units and associated Direct and Contract Health Services; outpatient clinics located in Claremore and Hastings hospitals; and the administrative support for all such services at the OCAO and Headquarters administrative levels.

Contracts retained under P.L. 93-638—Stilwell Equipment Acquisition Administrative; Sallisaw Construction;

Stilwell Construction; Stilwell Equipment Acquisition Management; and the Buy-Indian contract for Regional Adolescent Treatment Center. The terms of these contracts shall govern these programs, services and activities.

The Nation reserves the right to include such services and the funding therefor in this AFA, by way of amendment, or in future AFA's.

SECTION NINE
ITEMS OF DISPUTE

Any items or issues remaining in dispute under this AFA as of the execution date hereof shall be identified on an attachment to this AFA labeled "Items or Issues in Dispute." The disputed items/issues shall be transmitted to the Secretary immediately. The parties may brief the issues if they choose, but in any event a decision shall be made by the Secretary in writing no later than 30 calendar days after the execution date set forth below. If the decision grants the specific relief requested by the Nation, or if the dispute is settled between the parties, the funding shall be modified into this AFA by way of the Secretary's written decision which shall become a part of the AFA.

SECTION TEN
ADJUSTMENTS DUE TO CONGRESSIONAL ACTIONS

The parties agree that adjustments may be appropriate due to unanticipated Congressional action. Upon enactment of relevant Appropriations Acts, the adjustments may be negotiated as necessary; provided, however, the Nation shall be notified and consulted in advance of any proposed adjustments. It is recognized by the parties that circumstances may arise where funding variances or other changes or modifications may be needed, and the parties shall negotiate same in good faith.

Provided, however, this AFA shall not modified to decrease or delay any funding except pursuant to mutual agreement of the parties.

SECTION ELEVEN
PREVIOUS P.L. 93-638 CONTRACTS / GRANTS FUNDS

Any funds heretofore made available to the Nation under P.L. 93-638 contracts or grants which remain unexpended as of the effective date hereof shall be expended in accordance with the appropriate provisions of this AFA. Any such funds, and the corresponding services or activities, shall not be subject to the provisions of said contracts or grants except as provided herein or in any amendment hereto.

SECTION TWELVE
PAYMENT

The parties agree that IHS will request apportionment of 100% of total FY96 AFA funding in the first quarter. Upon receipt of apportioned funds the IHS will within 21 days process and make available to the Cherokee Nation the apportioned amount.

SECTION THIRTEEN
BASELINE MEASURES

In accordance with the Nation's Self-Governance Compact, the Nation agrees to submit semi-annual and annual Self-Governance Baseline Measures reports to the Secretary. The Nation and IHS are presently jointly involved in the development of the format for the FY-96 Baseline Report and agree that when finalized the baseline measures for FY-96 will be included as an addendum to the FY-96 AFA.

SECTION FOURTEEN
EFFECTIVE DATE

This AFA shall be effective on October 1, 1995, and this AFA, and any amendments hereto, shall remain in effect throughout the Nation's 1996 fiscal year.

SECTION FIFTEEN
MISCELLANEOUS PROVISIONS

1. The Nation shall have the right to participate in the development of "Budget Enhancements" for inclusion into the Indian Health Service's proposed budget.
2. The OCAO agrees to provide the Nation with copies of all of the OCAO's allowance documents when they are received at the OCAO.
3. The Nation shall have the right to share in any year-end resources made available to the OCAO or otherwise distributed by Headquarters.
4. The IHS is reviewing issues relating to transferring property to the self-governance tribes under Title III funding agreements. The IHS will resolve these issues during the 90-day review period following the execution hereof. Any transfers shall be made by way of addendum or other appropriate agreement between the parties.

SECTION SIXTEEN
ENDNOTES

1. Fiscal Year 1996 funding increases for population growth, mandatories, and contract support are not included in this AFA, due to the lack of required information. Such funding shall be adjusted and modified into this AFA when the actual FY 1996 appropriations become available, and the Nation's full share of such funding shall be paid. Funding hereunder shall also be increased by way of amendment(s) to this AFA whenever authorized by future

congressional action. The parties agree that any such funding which may be identified and made available for distribution to the Nation shall be transferred to the Nation without formal execution of an addendum or other modification document. The Nation shall be notified in advance of such transfer of funds and informed of the source and/or purpose of such funding.

2. Fiscal Year 1996 non-recurring funds are not included in this AFA, but shall be included herein by way of addendum when actual FY 1996 appropriations become available.

3. IPA/MOA resources are included in this AFA. On or before January 31, 1996, the Nation shall receive in lump sum the balance of unobligated IPA/MOA resources, except that 30 days estimated IPA/MOA costs may be withheld by the IHS for prospective payment of these costs. The Nation will be invoiced monthly for actual costs with periodic reconciliations of payments and costs, and with a final reconciliation and disbursement of finds occurring before the end of the fiscal year. No later than January 31, 1996, an estimated 30-day resource requirement for IPA/MOA salaries and benefits to be withheld will be agreed upon for FY 1996.

4. Regional Supply Center (Ada) resources are included in this AFA. The Secretary or Director of IHS is determining procedures whereby the Nation would purchase drugs and supplies from IHS at the RSSC with its allocation of RSSC resources. Under such procedures, RSSC will invoice the Nation monthly for its purchases of drugs and supplies. After the Nation has completed the appropriate receiving reports for internal control, the Nation will notify the Office of Self-Governance in writing, on a quarterly basis, authorizing transfer of funding from the AFA to the RSSC. These procedures will be implemented when they are approved by the Secretary or his designee.

5. Fiscal Year 1996 Outpatient Contract Health Service Funding is included in this AFA. The parties agree that the Nation's 1996 share to be included in this AFA, subject to adjustment based upon actual appropriations, is $2,084,560.

6. The parties agree that the Nation will provide Contract Health Service resources only for eligible Indian people residing in the service areas of Redbird Smith, Wilma P. Mankiller, Nowata, Salina, and Jay-Sam Hider health centers who have been referred by staff at said facilities to contract vendors for a higher level of ambulatory/ diagnostic care. Further, the parties acknowledge that the contract health services finding provided for in this AFA represents finds which IHS has specifically allocated to said health centers and not to the W.W. Hastings or Claremore Service Units.

7. All requests and documentation for Contract Health Service Deferred Services resources will be sent directly to IHS Headquarters East for finding determination. Said resources shall be identified and included in this AFA by way of further addendum executed by the parties.

8. The funding for this Program Formula line item had not been identified as of the date of execution of this AFA. Prior to determining the Nation's allocation of this line item, the parties agree to meet and discuss the methodology and calculation of such allocation. When an amount has been agreed to in an addendum hereto, the funds shall be included in the Nation's FY 1996 finding. By identifying and accepting this finding as "Program Formula," the Nation shall not be conceding that the formula used was appropriate or that such funding should not be allocated as tribal shares.

9. RPMS finds may be expended on computer technical support and training conducted by IHS or other parties.

10. The Unmet Needs figure is an approximation only, and may be adjusted in FY 1996 in accordance with the Unmet Needs program formula. Said adjustments shall be made by way of an addendum executed by the parties.

11. This figure is computed at the rate of $200 per registered nurse, $600 per dentist, and $1,000 per physician.

12. In addition to the funds identified in this line item, the Nation shall be entitled to participation in any Special Projects finding during FY 1996.

13. Public Law 86-121, Sanitation Facilities Construction Funds for the Cherokee Service Area for regular, housing and special projects shall be modified into the AFA by way of a letter agreement when such funds become available, and shall be expended in accordance with the provisions of said letter agreement and the attached project scope documents. Said letter agreement shall be signed by the Nation's Principal Chief and the IHS Official designated by the Director of IHS. The total amount of the project money identified in the letter agreement shall be added to this section of the AFA and shall be made available to the Cherokee Nation within 60 days after the IHS Area Office receives the completed project documents.

14. Cherokee Nation's allocation of O.E.H.E. Support Headquarters' funds for FY 94 and FY 95 was calculated on the basis of user population, yielding for FY 95 the sum of $465,000. The Nation has proposed that, to accommodate a transition from a user population formula to the workload formula, the Nation's FY 1996 allocation of this fund is an amount equal to 80% of the FY 1995 funding, and that the allocation for each succeeding fiscal year thereafter through FY 1999 shall be 80% of the previous fiscal year's funding; provided, that if the workload formula or other formula approved by the Director would

yield a larger allocation for any of the fiscal years during the transition period, the larger allocation would apply for any such year. Accordingly, the estimated allocations for FY's 1996 through 1999 are $372,000, $297,600, $238,000, and $190,400, respectively, unless for any such fiscal year the workload or other approved formula would yield a greater sum. After FY 1999, the workload or other formula approved by the Director shall be used to determine Cherokee Nation's allocation. The parties agree that the funding for this line item shall remain open to allow IHS to review the proposal and to meet no later than July 31 to resolve the FY 1996 O.E.H.E. support funding. At that time the parties shall execute an addendum to the AFA to provide for this funding. The funding described herein represents a negotiated settlement; the Nation does not concede that the workload formula is an appropriate method for allocating these funds.

15. The amounts included in the AFA for the Nation's OCAO and Headquarters tribal shares and for Sanitation Facilities Support reflect a negotiated, compromised amount and the parties do not necessarily accept each other's methodologies used in arriving at the amounts to be provided by the Secretary hereunder. Specifically the Nation disagrees with the decision of the IHS to utilize a "Tribal Size Adjustment" formula instead of historically applied User Population formula for resource allocation. Further, the parties agree to review OCAO and Headquarters residual resources and understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual.

16. The funding identified in these line items represents the Nation's allocation of its tribal shares of the OCAO and Headquarters, computed with a "percent compacted" figure based on the Nation's FY 1994 base funding. The parties have agreed that these amounts will be revised to

reflect a "percent compacted" based on the Nation's FY 1995 base funding (including full- year funding of the Stilwell health center). The OCAO has agreed to provide the Nation's revised percent compacted by sub-activity reflecting the use of FY-1995 funding levels, for the purposes of recalculating the funding of the Nation's tribal shares of the OCAO and Headquarters. The parties' agree that as soon as the OCAO has recalculated the Nation's percent compacted, this AFA shall be amended accordingly.

17. The parties shall negotiate the Nation's percentage of the Management Initiative Fund of the Headquarters' budget based on the Tribal Size Adjustment formula adopted by the Director of Indian Health Service. The negotiations shall be concluded prior to August 30, 1995, and the Nation's Tribal Size Adjustment share of the amount to be distributed shall be added to the Nation's tribal share of Headquarters' funds (Section Five of this AFA) by way of an addendum hereto. Any balance in the fund as of September 1, 1996, shall be paid to the Nation on the basis of the Tribal Size Adjustment formula.

18. See endnotes applicable to each of the funding categories identified in this Section.

IHS Footnote dated June 30, 1995

This agreement is contingent upon an internal review, during the 90-day review period, for consistency with Federal law and accuracy of calculations. Issues identified will be shared with the tribe(s) for further negotiations. Therefore these issues should be considered unresolved, e.g., funding of HQ tribal shares, title I provisions, contract support costs, and MOA/IPA agreements, etc. The Director in agreeing to sign the AFA will identify the issues and continue to negotiate with the tribe for resolution within the 90-day review period.

Dated this 30th day of June, 1995.

CHEROKEE NATION

By: /s/ John Ketcher
WILMA P. MANKILLER
Principal Chief

UNITED STATES OF AMERICA

By: /s/ Michael Trujillo
DR. MICHAEL TRUJILLO
Director of Indian Health Service
Department of Health and Human Services

[See JA Vol. II, PART 2 for Attachment #2, AFA Detail Report]

CHEROKEE NATION
P.O. Box 948
Tahlequah, OK 74465-0948
(918) 456-0671

Wilma P. Mankiller
Principal Chief

John A. Ketcher
Deputy Chief

June 29, 1995

Mr. Reuben Howard, Acting Director
Office of Self-Governance
Indian Health Services
Parklawn Building, Room 5A-37
5600 Fisher Lane
Rockville, Maryland 20852

Dear Mr. Howard

Enclosed herewith are three copies of the final negotiated Self-Governance Annual Funding Agreement for Fiscal Year 1996, which resulted from final negotiations held in Rockville on June 8, 9, & 23, 1995. The Cherokee Nation anticipates the recommendations of your respective offices for the Director to approve the proposed Funding Agreement. Please transmit the documents as appropriate and advise if further actions are needed by the Cherokee Nation to ensure the executed agreement is transmitted to the Congressional Committees by July 1, 1995.

Sincerely,

/s/ Charles L. Head
CHARLES L. HEAD
Self-Governance Coordinator

Enclosures

ADDENDUM NO. 1 TO FY 1996 ANNUAL FUNDING AGREEMENT BETWEEN THE UNITED STATES of AMERICA AND CHEROKEE NATION

This Addendum to the FY 1996 Annual Funding Agreement ("FY 1996 AFA") by and between Cherokee Nation ("Nation") and the United States of America, acting through the Indian Health Service ("IHS"), Department of Health and Human Services, is entered into pursuant to the provisions of 25 U.S.C. § 450 *et seq.*

Recitals

WHEREAS, at the time of execution of the FY 1996 AFA, certain issues on funding and related matters had not been resolved and, by agreement of the parties, were left open for further negotiation during the 90-day review period; and

WEREAS, some of the aforesaid issues have been resolved, and the parties have agreed to modify the FY 1996 AFA to incorporate the parties' agreement with respect to such issues.

NOW, THEREFORE, the parties agree as follows:

Purpose of Addendum

The purpose of this addendum is to mo FY 1996 AFA to reflect the agreements of the parties with respect to some of the unresolved issues and funding levels remaining as of the execution date of said AFA, as more specifically set forth hereinbelow. Except as expressly modified by this Addendum, the parties agree that the provisions of the FY 1996 AFA shall remain unchanged, in full force and effect.

Amendments to Section Two
of the FY 1996 AFA

Line item number four (4) under Section Two of the FY 1996 AFA, "Contract Support Costs," is hereby amended to read "Direct Contract Support Cost". The amount identified in the FY 1996 AFA, $477,885, is reduced by $4,808 for a new funding level of $473,077. This adjustment is a result of the administrative and conference reduction for FY 1995 that reduced the 1996 base.

4. Direct Contract Support Costs (1),(2)	$473,077

The new total for Section Two, General Budget Categories, reflecting the adjustment noted above, should read as follows:

TOTAL STANDARD INDIAN HEALTH SERVICE PROGRAMS	$17,621,762

Except as noted above, Section Two shall otherwise remain unchanged.

Amendments to Section Three
of the FY 1996 AFA

Section Three of the FY 1996 AFA is hereby amended to add a line item omitted from the FY 1996 AFA, i.e., "Permanent Change of Station." As of the date of execution of this Addendum, the funding for this additional line item has not been determined, and the parties agree to execute an appropriate modification agreement to provide for such funding once the amount been determined. The tabulation in this section shall now read as follows:

Environmental Health Support	$757,969
Management Initiative Fund (HQ)(17)	$
Unmet Need (8), (11)	$
Continuing Education (8), (11)	$
M&I (8), (12)	$
Permanent Change of Station (8)	$_____
Total Program Formula Funding	$757,969

Amendments to Section Five
of the FY 1996 AFA

The line item in Section Five of the FY 1996 AFA designated "Central Headquarters Tribal Share" is hereby amended to reflect an increase of $293,435 up to $1,918,142. The line item in said Section designated "OEHE Headquarters Tribal Share" is hereby amended to reflect funding in the amount of $400,000. One other line item, OCAO RPMS, is added to read as follows:

IHS/HQ Tribal Share (15),(16)	$1,918,142
OEHE Headquarters Tribal Share (14),(15)	$ 400,000
OCAO Tribal Share (15),(16)	$ 755,217
OCAO - RPMS(9)	$ (55,067)
Total OCAO and HQ Tribal Share:	$3,018,292

Amendments to Section Seven
of the FY 1996 AFA

Section Seven of the FY 1996 AFA is amended and replaced in its entirety to read as follows:

The funding made available to the Nation under this AFA is summarized as follows:

Standard IHS Programs	$17,621,762
Program Formula Funding	$ 757,969
Congressionally Earmarked Funding	$
IHS HQ Tribal Share	$ 2,318,142
OCAO Tribal Share (minus RPMS)	$ 700,150
Indirect Cost Funding	$ 4,172,614
Total FY 1996 Funding (18)	$25,570,637

Amendments to Section Twelve
of the FY 1996 AFA

Section Twelve of the FY 1996 AFA is amended and replaced in its entirety to read as follows:

The parties agree that IHS will make 100% of the service base funds available within 30 days of IHS apportionment. One hundred percent of the tribal shares for Central Head-

quarters and Area Office will be paid as follows; Seventy percent will be paid within 30 days of apportionment and the remaining 30% on or before July 1, 1996.

Amendments to Section Sixteen
of the FY 1996 AFA

Endnote No. 3 relating to MOA/IPA resources is hereby modified by adding to the end of the first sentence of said endnote: "and are estimated to be $848,536."

Endnote No. 4 relating to Regional Supply Services Center (RSSC-Ada) resources is hereby amended and replaced to read in full as follows :

> The Nation's allocation of the Regional Supply Service Center resources are estimated to be $1,500,000 (subject to quarterly reconciliation and adjustment), and the parties agree that these resources shall remain with IHS Headquarters, unless the Secretary or designee determines procedures whereby the Nation might purchase drugs and supplies from the IHS at the RSSC utilizing the Nation's allocation of RSSC resources. Contingent upon Secretarial approval of such procedures, the parties agree that the balance of the Nation's RSSC resources will be transferred to the Nation, and RSSC will invoice the Nation monthly for purchases of drugs and supplies. Pending such approval, however, the funds will remain with IHS as stated above; after the Nation has completed the appropriate receiving reports for internal control, the Nation will notify the Office of Self-Governance in writing, on a quarterly basis, authorizing transfer of funding from the AFA to the RSSC. The Nation reserves the right to negotiate a future modification agreement to provide for a transfer of some or all of such resources for purchasing drugs and supplies from third-party suppliers.

Endnote No. 6 relating to Contract Health Service resources is hereby modified by adding the following sentence after the last sentence in said Endnote: "The parties further agree that this endnote is not intended to change the eligibility criteria for Contract Health Services."

Endnote No. 7 relating to Contract Health Service resources is hereby amended and replaced to read in full as follows:

> All requests and documentation for Contract Health Service Deferred Services resources will be sent to IHS Headquarters East through the OCAO for funding determination. Said resources shall be identified and included in this AFA by way of further addendum executed by the parties.

Endnote No. 8 relating to certain Program Formula Funding line items is hereby amended and replaced in its entirety to read as follows:

> The funding for this Program Formula line item had not been identified as of the date of execution of this AFA. Prior to determining the Nation's allocation of this line item, the parties agree to meet and discuss the methodology and calculation of such allocation. When an amount has been agreed to in an addendum hereto, the funds shall be included in the Nation's FY 1996 funding. Provided, however, funding for continuing education and permanent change of station will be distributed from IHS HQ to the OCAO and from there allocated to the Nation pursuant to the said methodology. Funding for all other HQ program formula line items shall be distributed directly to the Nation from IHS HQ in accordance with said methodologies. By identifying and accepting this finding as "Program Formula," the Nation shall not be conceding that the formula used was appropriate or that such funding should not be allocated as tribal shares.

Endnote No. 9 relating to RPMS resources, is hereby amended and replaced in its entirety to read as follows:

> The Nation agrees to not compact its share of OCAO RPMS budget line item under the FY 1996 AFA. Presently this amount has been identified at $55,067. The Nation and OCAO have met and concluded this finding will remain with the OCAO in exchange for continued information technology support in accordance with Attachment 'A'. With respect to IHS Headquarters, the Nation shall receive its allocation of IHS Headquarters RPMS equipment fund, OIRM Headquarters East and OIRM Headquarters West funding in accordance with Section 12 hereof; provided, however, the parties agree that the Nation and United States may amend this AFA at a later date to provide identified products and services agreed upon with the Office of information Resources Manangement and the Office of Health Programs Research and Development.

Endnote No. 14 of the FY 1996 AFA, relating to Headquarters OEHE Support funding is hereby amended and replaced in its entirety to read as follows:

> The parties hereto have agreed to a compromise figure of $400,000 as the Nation's FY 1996 allocation of OEHE Support (Headquarters). However, the funding described herein represents a negotiated settlement; the Nation does not concede that the workload or any formula other than a user-population based allocation is appropriate for allocating these funds.

Endnote No. 16 of the FY 1996 AFA is hereby amended and replaced in its entirety to read as follows:

> The parties have agreed to the Nation's "percent compacted" based on the Nation's FY 1995 base finding (including full-year funding of the Stilwell Health Center, which resulted in the $297,495 increase in the Nation's Tribal Share of IHS Headquarters Office. The new "percent compacted" has been used to determine the

> Nation's FY 1996 Tribal Share allocation of IHS HQ, and said "percent compacted" figure will be used to recompute the Nation's FY 1996 Tribal Share allocation of the OCAO once the OCAO residual has been determined. At that time, the parties agree to execute an appropriate modification agreement to adjust the Nation's FY 1996 Tribal Share allocation of the OCAO.

Dated this ____Day of _____, 1995.

CHEROKEE NATION

/s/ Honorable Joe Byrd
HONORABLE JOE BYRD
Principal Chief

UNITED STATES OF AMERICA

Dr. Michael Trujillo
Director of Indian Health Service

Department of Health and Human Services

THE UNITED STATES DEPARTMENT OF THE
INTERIOR OFFICE OF HEARING AND APPEALS
INTERIOR BOARD OF CONTRACT APPEALS

IBCA 3877-3879/98

APPEAL OF CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I have been the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) for four years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service is responsible for formulating and executing the IHS budget. I have personal knowledge of the manner in which contract support costs are paid to the tribes/tribal organizations.

3. In the fiscal year 1994 appropriations for the IHS, Congress appropriated $136,686,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Fund (ISD), to be available until expended, for contract support costs for initial or expanded tribal contracts with the IHS under the Indian Self-Determination Act.

4. In the fiscal year 1995 appropriations for the IHS, Congress appropriated $145,460,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Act.

5. In the fiscal year 1996 appropriations for the IHS, Congress appropriated $153,040,000.00 for contract support costs, including $7,500,000.00 that was earmarked for the Indian Self-Determination Fund (ISD), to be available until expended, for contract support costs for initial or expanded tribal contracts with the IHS under the Indian Self-Determination Act.

6. For the fiscal year 1994 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

7. For the fiscal year 1995 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

8. For the fiscal year 1996 the appropriation for contract support costs has been distributed, and no contract support funds remain for that fiscal year.

The foregoing is true and accurate to the best of my knowledge, information, and belief.

Executed this 18 day of December, 1998 in Rockville, Maryland.

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

INTERIOR BOARD OF CONTRACT APPEALS

APPEAL OF CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF DANIEL J. CESARI

I, Daniel J. Cesari, hereby declare as follows:

1. I have served in the capacity of Deputy Director, Division of Financial Management, at the Headquarters of the Indian Health Service (IHS) since 1995. I am primarily responsible for financial policy and the budget execution function in IHS and, in the absence of the Director, Division of Financial Management, IHS, the operation of the IHS financial system (budget, accounting, planning, etc.)

2. Since fiscal year (FY) 1995, the IHS has paid out contract support costs (CSC) for new and expanded contracts/compacts to Indian tribes and tribal organizations on a first come - first served basis. Because the amount of funds Congress appropriated for CSC for new and expanded contracts/compacts for FYs 1995, 1996, and 1997 was limited to $7.5 million per year, the IHS did not have the funds available to fully pay each and every tribe who requested CSC during those years. To fully fund all of the CSC requests nationwide, the IHS would have to use monies from other budget activities within the Services Appropriations that fund the recurring operations of various IHS Area offices and Service Units.

3. In FY 1996, the amount of new CSC requests exceeded the CSC appropriation of $7.5 million by $29.2 million. The

IHS policy for CSC is contained in Indian Health Service Circular No. 96-04, April 12, 1996. IHS issued this policy through an extensive and active consultation process with various tribes and tribal organizations throughout the country. In essence, once a tribe's request is approved to assume the operations of a program, function, service or activity (PFSA), they are entitled to CSC subject to the availability of funds. If funds are not available in the appropriation, the tribal CSC request is put on a list, known as the Indian Self-Determination (ISD) Queue. When funds are appropriated by Congress, the CSC request is processed and the tribe is paid its CSC, where it then becomes a part of the tribe's recurring base in future years.

4. The $29.2 million on the ISD Queue as of December 31, 1996, is the total amount of CSC funding that IHS is required to pay to tribes for contracts/compacts for PFSA that they (the tribes) have assumed. If the IHS were forced to pay the $29.2 million to these contracting/compacting tribes, IHS would, of necessity, have to spread the reduction among the recurring base funding of the Area offices and Service Units in IHS. This will result in the Area offices and Service Units having less funds for the provision of a full range of medical, dental, and mental health services to Indian people whose programs are being operated under the auspices of Federal operations.

5. Attached as Exhibit 1 is a table demonstrating how the IHS will have to allocate from its Services Appropriation to fully fund all of the nationwide CSC requests for FY 1996. The table is broken down by the twelve Area offices of IHS, including Headquarters, and demonstrates how and in what amounts the money Congress appropriated for the IHS would have been distributed had all CSC requests been fully funded nationwide for FY 1996. The number columns (1-13) at the top of the table represent the twelve Areas of the IHS, while the letters (A-U) on the left side of the table show the meth-

odology of how funds will be allocated. The conclusions drawn are based on my review of the Areas recurring base allocations and the requirement that if a reduction were to occur, the burden of the reduction would be shared equally among all IHS Areas, including Headquarters.

6. Block A 13 of the Table indicates that the total amount of the IHS Services Appropriation available for distribution to all Area offices and Services Units is $1,375,245,000. This amount is calculated as follows:

Appropriation	$1,747,842,000
Earmarks:	
ISD Fund	7,500,000
Contract Health Care	350,564,000
Catastrophic Care	12,000,000
Rescission	2,533,000
Net Appropriation	$1,375,245,000

This amount ($1,375,245,000) is distributed to the Area Offices as a recurring base amount for the operation of the Area Office and Service Units within the Area. The recurring allocation is developed historically and is adjusted upward every year for mandatory increases (pay raise, inflation, etc.) and for decreases specified in the Appropriation (rescissions, program decreases, etc.). The recurring base provides for continuity of services so the Areas and Service Units have a relative stable base of funding. If the Areas and Service Units did not have a recurring base allocation from year to year, they would be subject to significant fluctuations in funding and could not operate the medical program with any degree of certainty from year-to-year.

7. For purposes of determining what amounts of the Area office recurring budget can be reduced for payment of CSC, I first excluded certain funds from the Area office budgets

because those dollars belong to the Tribes based on tribal contracts and compacts (including buybacks) negotiated under Title I and III of P.L. 93-638, as amended. (See Block B—Exclusions) These amounts are fixed and cannot be reduced except in instances of reductions of appropriations. See section 106(b)(1-5), P.L. 93-638, as amended.

Lines C, D, and E represent exclusions for contracts (Title I), compacts (Title III), and buybacks under P.L. 93-638, as amended. Title I refers to contracts awarded for self-determination operations where tribes have formally requested to administer and operate PFSAs operated by the Indian Health Service. Title III refers to compacts awarded for self-governance operations of PFSAs. Buybacks represent those PFSAs that the tribe has contracted or compacted but now want the IHS to carry out portions of the PFSA on their behalf. The buyback funds belong to the tribe as a part of their contract/compact, and the IHS is merely performing at their request.

8. Row G is the Adjusted Services Funding for Direct Federal Operations. This represents the net amount of funding that each Area has for operations of Federal IHS medical and preventive services in a that Area that are not encumbered with mandatory payments to tribes for Title I or Title III contracts/compacts. This amount is calculated by taking the net Services Appropriation (Row A) less mandatory payments to Titles I and III tribal payments (Row F) to arrive the balance at Row G.

9. Row H is the Area percentage of Revised Allowance. This is a percentage distribution of the net Area Office recurring allocation to the total Federal operations after exclusions have been made (Row G, Line 13). To arrive at this percentage, I divided the net recurring base of each Area (Row G) by the total (Row G, Line 13). For example, Aberdeen (Row G, Column 1), $85,850,417/$768,774,466 = 11.2%; Alaska (Row G, column 2, $55,992,886/$768,774,466 = 7.3%, etc.

This figure shows the relative percentage burden of paying total CSC spread among all Areas in an equitable manner.

10. Row I is each Area's share of $29.2 million CSC need. This represents each Area's reduction in order to pay the total CSC on the ISD Queue of $29.2 million. This figure is calculated by multiplying the individual Area percentages in Row H times $29.2 million. For example, for Aberdeen, $29.2 million x 11.2% (Row H, Column 1) = $3,263,047; Alaska, $29.2 million x 7.3% (Row H, Column 2) = $2,128,207; Albuquerque, $29.2 million x 6.8% (Row H, Column 3) = $1,977,209, etc.

11. IHS developed a methodology for calculating the amount of money needed by Area to fund the total CSC ISD Queue for FY 1996 using the only funds available to IHS. This method takes into consideration the relative recurring funds within an Area to spread the burden of any funding reduction equally throughout IHS and to spread the reduction between salaries and other items of expense. Actual Area reductions will probably vary according to each Area's precise circumstance; however, I tried to provide a framework and a rationale so that there could be as much consistency as possible throughout IHS. I gave overall guidance for Area office average salaries and provided the assumption that the reduction should not be taken entirely out of salaries but also other types of expenses (i.e., travel, training supplies, etc.) as well.

12. Rows J, K, and L represent the distribution of the reduction by Area broken out by salaries and benefits and other expenses. The calculation of the total reduction was split 80% for salaries and benefits (Row L) and 20% for other expenses. This split recognized that the Areas recurring allocations include all types of expenses; therefore, it was reasonable to assume that some of the reduction would include expenses other than personnel. The 80% and 20% split is an estimate and in reality the Areas will allocate the

reduction within personnel and other costs based on their unique circumstances.

13. Row M represents Area Average Salary for Personnel and Benefits. This figure was provided to the Areas as guidance on what amounts could be realized by a reduction-in-force (RIF). The average salary and benefits cost for an employee in each Area is calculated by dividing the salaries and benefits costs experienced during FY 1996 by the number of full-time equivalent (FTE) employment.

14. Rows N and O represent the number of employees that would have to be fired to realize the reduction for full funding of contract support costs. This is calculated by dividing the Area share of the salaries and benefits (Row L) by the Area average salary cost (Row M). For example, for Aberdeen (Column 1 Row L) divided by column 1, Row M, or $2,610,438/$42,157 (Column 1, Row M) = 62 (Column 1, Row O), etc.

15. Row P represents the number of FTEs allocated to each area before any RIF.

16. Row Q represents the number of estimated remaining FTEs per Area after the necessary RIF.

17. Rows R and S are estimated costs associated with a RIF. Federal employees who are involuntarily separated, without cause, are entitled to certain benefits, severance pay and lump-sum leave. Because the Area offices will be required to conduct a RIF in order to come up with the funds for CSC, the Areas offices and Service Units must pay additional separation costs. In order to pay these separation costs, additional staffing reductions will be necessary at each Area office and Service Unit for a one-year temporary period only. Severance pay calculation was developed as a percentage of average salary plus an estimate for lump-sum leave (unused annual leave).

18. Row T is the estimated total additional amount needed by each Area to pay for separation costs associated with the RIF. This amount is calculated by multiplying the average severance pay times the FTE reduction (Row O). The estimated amounts may not be exact due to rounding and the calculation of the formula in the software in the computer.

19. Row U is the estimated number of additional full time employees that the Areas would be required to fire temporarily (one year) in order to meet the targeted funding reduction in their recurring base.

20. Pursuant to authority of 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed in Rockville, Maryland, on February 18, 1999.

/s/ Daniel J Cesari
DANIEL J CESARI

[See JA Vol. II, PART II for attached table]

INTERIOR BOARD OF CONTRACT APPEALS

IBCA 3877-98 through IBCA 3879-98

CHEROKEE NATION OF OKLAHOMA,
Contractor-Appellant,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
(INDIAN HEALTH SERVICE)
Appellee.

DECLARATION OF CARL L. FITZPATRICK

I, Carl L. Fitzpatrick, declare as follows:

1. I am the Director of the Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service. I have held this position for five years.

2. The Division of Financial Management for the United States Department of Health and Human Services, Indian Health Service (IHS) is responsible for formulating and executing the IHS budget. I have personal knowledge regarding the IHS Headquarters budget, contract support cost allocations, and reserves and past year appropriations accounts.

3. Each fiscal year, IHS receives a lump sum appropriation for "Indian Health Services." IHS' total appropriation from Congress for "Indian Health Services" in fiscal year 1996 was $1,744,494,000. The IHS obligated all of the funds that Congress provided in its "Indian Health Services" appropriation for fiscal year 1996 for programs serving tribes, either directly or through self-determination contracts and compacts, with the exception of some minor unobligated sums.

Appropriations Structure

4. The annual appropriation for "Indian Health Services" is structured on the basis of budget subactivities such as, Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Contract Medical Care, Tribal Management, and Contract Support Costs. Congress approved these budget subactivities during the budget process as appropriate purposes for IHS' expenditure of the funds.

5. IHS submitted its budget request for fiscal year 1996 based on these subactivities for Congress' review in the so-called Congressional Justifications, by which IHS explains its portion of the President's budget request to Congress prior to the start of the fiscal year. Then, when Congress actually appropriated the money for fiscal year 1996, Congress earmarked the funds for each subactivity for which the appropriation was intended by specifically listing funding for the subactivities in its appropriation committee reports. Any increases that Congress provided for fiscal year 1996 were reported by subactivites in the appropriation committee reports.

Appropriation Increases for Fiscal Year 1996

6. Attached as Exhibit 1 is a table showing the history of the fiscal year 1996 IHS appropriation request for "Indian Health Services." This table, prepared on September 23, 1996 by my office in the regular course of business, traces the IHS request for appropriations that year through the Department of Health and Human Services, through the Office of Management and Budget and the President's request to Congress, through the House, Senate, and Conference actions to the final appropriation.

7. The table shows the appropriation increases over the appropriation for fiscal year 1995 earmarked by budget subactivity. These increases are: (1) $16,152,000 for mandatory cost of living pay increases; (2) $7,500,000 for the Indian

Self-Determination (ISD) Fund; (3) $10,512,000 for staffing of new facilities earmarked by facility ($840,000 for the hospital in Kotzebue, Alaska; $6,392,000 for the hospital at Shiprock, New Mexico; $3,144,000 for the Alaska Native Medical Center in Anchorage, Alaska: and $136,000 for the Hays Health Center in Montana); (4) $750,000 for epidemiology centers; (5) $1,500,000 to enhance IHS' billing and collection systems to collect third party revenue; (6) $2,500,000 for contract medical care; (7) $3,000,000 for the urban Indian health program; and (8) $200,000 for the ongoing Indians into psychology program. These increases total $42,114,000.

8. These increases were offset by decreases of $400,000 for an Office of the Assistant Secretary staff transfer; $2,000,000 for the Indian health professions program; $3,000,000 for tribal management grants; and $2,000,000 for Headquarters direct operations totaling $7,400,000. This leaves a total net increase in the "Indian Health Services" appropriation for fiscal year 1996 of $34,714,000.

Overview of IHS Allocations by Subactivity

9. The majority of the IHS' budget is allocated each year on a recurring basis to the twelve Area Offices and to Headquarters. Funds are allocated by subactivity to pay for the many health services and programs that IHS directly provides or that the tribal contractors independently provide. These subactivities include Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Immunization, Contract Medical Care, and Tribal Management, among others. Included with the Area Office allocations are amounts for contract support costs (CSC) for existing contracts, as well as CSC for new and expanded contracts that are to be distributed to the tribal contractors within the various Areas.

10. For purposes of allocating the IHS budget, IHS has twelve Area Offices, as well as Headquarters. Like the other Area Offices, Headquarters receives an allowance from the

total IHS budget. The Headquarter's allowance is broken down by subactivity and is used for the administrative functions and services provided by Headquarters for the entire IHS. Some of these funds are for those commitments that must be managed by Headquarters, e.g., funds for scholarship awards to individual Indians. Apart from funds supporting non-contracted programs and the Headquarter's Residual, the Headquarter's allowance is subject to disbursement to tribal contractors as Headquarter's shares.

11. The Headquarters' managed budget also consists of funds that are allocable to tribes for certain programmatic functions, but, because the need for such funds cannot be quantified at the beginning of the fiscal year, the funds are distributed by Headquarters to the Area Offices during the course of the fiscal year on a non-recurring basis for subsequent distribution to the tribal contractors and directly-operated service units. Examples are the Catastrophic Health Emergency Fund (CHEF) established under Title II of the Indian Health Care Improvement Act to reimburse service units for extraordinary medical costs and certain program funds distributed based upon workload or other level of need formulas.

12. The second part of the IHS Overall Budget are the IHS Headquarter's Reserve Accounts. A small portion of the IHS Budget is not allocated immediately to the Area Offices, but is retained in Reserve Accounts by subactivity, in anticipation of unexpected needs and funding emergencies arising during the course of the fiscal year. These funds are provided to the Area Offices during the fiscal year on a non-recurring basis (i.e. toward expenses that do not occur in the same area in the same amounts every year) for subsequent distribution to tribal contractors and/or IHS-operated service units as needs arise. If there are remaining funds at end of the fiscal year, the balances of the Reserve Accounts are distributed to the Area

Offices prior to year end for subsequent distribution to tribal contractors or for IHS' direct operations.

13. The third, and remaining, portion of the IHS' Budget consists of funds set aside for Area Office and IHS Headquarters' Residual. These residual funds support inherently federal functions needed for the IHS to function as a federal agency even if all IHS programs were contracted or compacted by tribes. Neither the Residual for IHS Headquarters nor the Residual for the individual Area Offices is available for reprogramming (i.e. to make up for the contract support cost shortfall).

IHS Area Office Allocations

14. For purposes of health services delivery, each Area Office is subdivided administratively into service units. A service unit provides health services to IHS beneficiaries within a defined geographic area. Service units may be directly operated by the IHS or operated by tribes or tribal organizations under Self-Determination contracts or Self-Governance compacts pursuant to the Indian Self-Determination Act.

15. There are approximately 150 service units within the IHS system nationally. These include some 500 direct health care facilities, 49 hospitals, 195 health centers, 8 school health centers, and 289 health stations, satellite clinics and Alaska village clinics. As of 1996, IHS directly operated approximately 65% of its service units. The remaining 35% were operated by Tribes and tribal organizations which had entered into self-determination contracts and compacts with HHS pursuant to the Indian Self-Determination Act.

16. Whether operated directly by the IHS or by tribal contractors and compactors, service units are funded for the most part on a recurring basis from the various subactivities of the appropriation discussed above. IHS distributed most of its "Indian Health Services" appropriation for fiscal year 1996

to its twelve Area Offices on a recurring basis by budget subactivity.

17. Each Area Office in turn allocates to its service units (whether directly or tribally operated) the service unit's share of the Area's recurring budget (including mandatories and programs increases) for that fiscal year. Increases earmarked for particular service units are allocated to those service units. For example, as noted above, the IHS received a $10,512,000 increase in fiscal year 1996 for staffing of four new facilities. Because this increase was earmarked for particular facilities, the increase was distributed to those Areas wherein the facilities are located, such as the Navajo Area where the Shiprock hospital is located.

18. In addition to its recurring service unit budgets, each Area Office also has a recurring budget for Area Office administrative support services which support delivery of health services at the service units. Tribes and tribal organizations may contract and compact their "tribal shares" of the Area administrative support services associated with their service units. Thus, most Area Office administrative support functions are, except for a small Area residual, subject to contracting and compacting under the ISDEA.

19. Those tribes and tribal organizations contracting or compacting for their share of the Area Office administrative support functions also received on a recurring basis their shares of the funds supporting those contracted and compacted Area administrative support functions. Funds supporting Area administrative support functions for the Area's directly operated service units remained in the Area Office budget to support those activities at the Area Office level.

20. Attached hereto as Exhibit 2 are documents entitled "Services Appropriation, Recurring/Non-Recurring Allocations for FY 1996" prepared by my office after the end of the fiscal year in the ordinary course of business. The tables

summarize the Area allocations on a recurring and non-recurring basis for fiscal year 1996. As the tables demonstrate, IHS allocated to its Area Offices on a recurring basis approximately $1.212 billion of its "Indian Health Services" appropriation. The tables also show non-recurring allocations to the Areas from Headquarters accounts including the redistribution of self-governance funds to the tribes.

Headquarters' Managed Budget

21. The tables comprising Exhibit 2 also show the allocations to Headquarters by subactivity.

22. Attached as Exhibit 3 are tables showing a further breakdown of Headquarter's reserve accounts by subactivity. These documents were prepared by my office on September 25, 1996, in the ordinary course of business with handwritten notations made by Brenda Fookes of my office. The tables show, for example, that Headquarters reserved approximately $11,570,000 of the approximately $834,700,000 set aside for the Hospitals and Clinics budget subactivity for fiscal year 1996. In addition, Headquarters had reserves of $1,171,900 for dental, $702,500 for mental health, and $2,194,600 for alcohol/substance abuse programs, $9,913,900 for contract medical care, to name a few.

23. The attached tables show breakdown of the allocation and disposition of these reserve accounts. For example, the reserve of $11,570,000 for the hospitals and clinics subactivity consisted of $4 million for the IHS Director's emergency fund to be used for emergency situations that may arise throughout the national IHS health delivery system over the course of the fiscal year; $638,600 was reserved for Health Promotion/Disease Prevention (HP/DP) activities; $224,733 for model diabetes programs; $1,195,200 for nursing activities; $750,000 for the IHS epidemiology center; $1,500,000 for collection and billing activities; $75,000 for non-physician co-step activities; $1,707,100 for recruitment

and retention of personnel; and $1,012,500 for program evaluation. The table shows expenditures during the course of the fiscal year for each of these categories within the Hospitals and Clinics reserve account, leaving a zero balance at the end of the fiscal year.

Contract Support Allocations

24. Congress earmarked a total of $153,040,000 in its appropriation committee reports for contract support costs for fiscal year 1996. This amount included a $7.5 million ISD Fund segregated in the appropriations statute as a separate fund "available until expended." The $7.5 million ISD Fund was distributed to the Areas on the basis of priority placement of tribal requests for ISD funding maintained on the ISD priority (queue) list with the exception of $195,478 which was distributed the following year. The remainder of Congress' earmarked allocation of contract support funds, with the exception of the $7.5 million ISD Fund, was allocated to the Area Offices for existing tribal contracts and compacts.

Unobligated Balances

25. At the end of every fiscal year, there is typically a very small sum of "unobligated" money. IHS usually becomes aware of these unobligated funds after the close of the fiscal year around mid-October when the IHS completes its accounting process for closeout of the fiscal year. My duties include monitoring these unobligated balances. The appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account.

26. I have consulted records maintained by my office in the regular course of business which show that IHS had $1,406,176 unobligated from its "Indian Health Service" appropriation for fiscal year 1996 at the end of the fiscal year.

27. After the close of each fiscal year, IHS continues to record expenses that had been incurred during the course of that fiscal year. The unobligated balances are used to satisfy those incurred expenses. As a result, to date, all unobligated funds from fiscal year 1996 "Indian Health Services" appropriation have since been spent either for IHS' direct operation of programs for tribes, or for the funding of self-determination contracts and compacts that allow Tribes to operate the programs themselves. In other words, funds that are "unobligated" at the end of the fiscal year are later used to satisfy IHS obligations from that year and are no longer available for reprogramming for contract support.

CSC Shortfalls

28. Congress has consistently underfunded contract support costs in connection with self-determination contracts and compacts. In 1996, for example, the IHS received requests for contract support costs for newly acquired or expanded programs that exceeded the Congressionally established $7.5 million ISD Fund established in the appropriation statute to provide CSC for that purpose by $29.2 million.

29. As explained above in paragraph 7, the IHS received increases totaling $42,114,00 for the "Indian Health Services" appropriation for fiscal year 1996. The $7.5 million ISD Fund was distributed for CSC. The $16,152,000 increase for mandatory pay increases was distributed across the board to all IHS and tribally operated service units nationwide. The $10,512,000 earmarked for staffing of four new facilities was distributed to those facilities to support delivery of health services to the tribes served by those facilities. The $3,000,000 increase for urban health programs funded under Title V of the Indian Health Care Improvement Act. The $2,500,000 increase for contract medical care was distributed to the Areas for contract health services. The $750,000 increase for epidemiology centers was used for three centers for collecting epidemiology data for the benefit of the IHS

delivery system nationwide. The $ 1,500,000 increase to enhance IHS billing and collection systems was allocated to IHS Headquarters and used to enhance IHS' ability to bill and collect from Medicare, Medicaid, and other third parties. Finally, the $200,000 increase earmarked for the Indians into Psychology Program was allocated to that program.

30. Reprogramming any of these increases for CSC in fiscal year 1996 would have taken funds used to support programs and projects serving tribes. Furthermore, if IHS were required to pay the shortfalls on the ISD queue list for every tribe and tribal organization with unfunded requests on the list, IHS would have been required to deduct approximately $29.2 million from amounts allocated to support health service delivery programs for other tribes.

The following is true and accurate to the best of my knowledge and belief. Executed in Rockville, Maryland this 27 day of March, 2000.

/s/ Carl L. Fitzpatrick
CARL L. FITZPATRICK

[See JA Vol. II, PART 2 for attached tables]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE CHIEF JUDGE BERNARD V. PARRETTE

APPELLEE'S SUPPLEMENTAL BRIEF

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ARGUMENT

At the Oral Argument held April 9, 2003, the Court directed the parties to answer the following question:

> Judge Dyk: The question is were there funds that the Secretary could have used to satisfy these contract obligations that were not obligated under contracts with other tribes or otherwise restricted by the appropriations legislation.[1]

As discussed below, both the record and judicially-noticeable public documents reflect that no more than 35% to 43% of the Indian Health Service's ("IHS's") entire appropriation was obligated to tribal contracts in any one of the three subject years. These same sources show that, depending on the year, only 52% to 57% of the IHS appropriation was either committed to those tribal contracts or otherwise restricted by unrelated statutory earmarks. With respect to the legal availability of appropriations, these materials thus definitively refute any suggestion that IHS was limited in reprogramming its lump-sum appropriation to pay

---

[1] Supp. Add. 25 (Appellee's transcription of the April 9, 2003 oral argument). When the Court first discussed its request, the panel said this:

> Judge Clevenger: [T]he panel would like to have supplemental briefing from both sides to be submitted . . . on this point about whether there were funds available. We're talking about whether, in the given year, was there money that the Secretary could have used to pay the bills that you submitted to it.
>
> [counsel interruption]
>
> Judge Dyk: Without violating the contract obligations to other tribes.

Id. at 18. *See also id.* at 10 (Judge Clevenger) (questioning whether the Secretary may have "made a mistake and entered into too many contracts, if you will").

Appellee's contracts because of competing obligations to other contractors or other mandatory programs.

1. The issue addressed in this Supplemental Brief arises late in the day only because Appellant's colloquy with the Court suggested, for the first time ever, that in fiscal years 1994, 1995 and 1996 IHS faced a situation where the agency had over committed itself to pay more to tribal contractors than was contained in its unrestricted lump-sum appropriation.[2] As the record and incontrovertible public facts reflect, however, such a claim cannot be sustained.

Although the Secretary below never offered any proof on this point with regard to two of the three fiscal years at issue, the Secretary's limited proof for FY 1996 is sufficiently revealing. The affidavit of Daniel J. Cesari states that of IHS's non-earmarked FY 1996 adjusted appropriation of "$1,375,245,000,"[3] a total of only $606,470,534" was committed to contracts under "Title[s] I & III" of the ISDA.[4] By declarant Cesari's reckoning, the balance of $768,774,476 was neither committed to such contracts nor earmarked. As Appellee noted at oral argument, Supp. Add. 16, these contract commitments represent only about 35% of FY1996's entire appropriation (including earmarks). See also JA 478-79, ¶15 (similarly declaring that in FY 1996 only "35% [of the agency's field "service units"] were operated by Tribes

[2] Were this true, the situation would be comparable to that faced by the court in *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). Rather than simply refusing to pay some contractors over others, the agency would have been required to "impos[e] . . . a pro rata reduction among all the eligible Tribes" within the available appropriation amount. *Id.* at 1348.

[3] JA 451, ¶ 6 (explaining adjustments); *see also* JA 458 (line (A), col. 13).

[4] JA 458 (line (F), col. 13); *see also* JA 452-53,¶7 (explaining this part of the JA 458 table). For a discussion of Titles I and III, *see* Answering Br. 10 n.22.

and tribal organizations which had entered into self-determination contracts and compacts"). Thus, any suggestion that the total IHS FY 1996 appropriation was over-committed by excess agency commitments to tribal contracts is affirmatively disproved by the limited evidence the Secretary offered below.

2. Appellant's speculation is also disproved by other public records. Each February the President submits a proposed Budget to Congress for the coming year. The President's Budget covers every federal agency, and each agency in turn develops its own Congressional Budget Justification. Each Justification sets forth details supporting the President's Budget, including how the agency plans to spend its appropriations in the current year, and how it spent them in the immediately preceding year.

In the case of IHS, the Department of Health and Human Services ("DHHS") annually submits to Congress IHS's "Justification of Estimates for Appropriations Committees" (hereafter "IHS Budget Justification"). *See* Supp. Add. 26-34 (attaching excerpts of FY 1996 through FY 1998 IHS Budget Justifications).[5] What is most significant here, given the Court's question, is that each IHS Budget Justification reports on IHS's appropriations expenditures in the most-recently concluded fiscal year *by separating out the agency's expenditures on tribal contracts from all other agency expenditures*. Thus, the FY 1996 IHS Budget Justification details IHS's FY 1994 spending in a convenient one-page Table that separates out IHS spending on tribal contracts from all other IHS spending that year. Supp. Add. 27. The FY 1997

[5] Such DHHS official publications, widely available to the public, are judicially noticeable under Fed. R. Evid. 201(b) and (d). *See also* Advisory Comm. Note to Rule 201(f) ("judicial notice may be taken . . . on appeal"). IHS now posts these Justifications on its website. *See http://www.ihs.gov/ PublicInfo/PublicAffairs/Press Releases/Press_ Release_2002 Release-3 IHS_2003_Budget_Justification_Docs.asp.*

and FY 1998 Budget Justifications contain similarly detailed Tables reporting on all IHS tribal contract spending in FY 1995 and FY 1996, respectively. Supp. Add. 30, 33.

These annual IHS Budget Justification Tables permit one to determine the portion of the IHS "Services" appropriation[6] that was committed each year either to tribal contracts or by restrictive appropriations Act earmarks, and correspondingly the portion of the IHS appropriation that was not so committed. As more fully discussed below, these documents show that unrestricted funds were available to pay Appellee's contract support costs in each of the years at issue.

For the Court's convenience, Appellee has prepared a chart, based upon the IHS Budget Justification Tables, entitled "PORTION AND PERCENTAGE OF IHS'S SERVICES APPROPRIATION NEITHER UNDER TRIBAL CONTRACT NOR EARMARKED IN APPROPRIATIONS ACTS" ("Chart"). Supp. Add. 35-36. The Chart restates the amounts IHS paid to tribal contractors each year under the Indian Self-Determination Act. Supp. Add. 35 at line 3. It also accounts for all remaining funds each year that were restricted in the Appropriations Acts. *Id.* at lines 5 and 6. As the Chart reflects, during the three years at issue here between 35% and 43% of IHS's "Services" appropriation was obligated to tribal contracts. *Id.* at line 4. When non-contracted earmarked funds are factored in as also unavailable for reprogramming to other purposes (including payment of Appellee's contracts), the Chart further demonstrates that the Secretary's combined contract payments and restricted earmarks still only consumed between 52% and 57% of his entire lump-sum appropriation in the three fiscal years, *id.* at line 9, leaving between $737,117,000 and $795,172,000 in legally-available funds subject to reprogramming to pay

[6] Only the IHS "Services" appropriation is at issue here. The agency's separate "Facilities" appropriation is not.

each of Appellee's contracts. *Id.* at line 7. *See Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980).

IHS's own Budget Justifications to Congress thus provide a complete answer to the Court's inquiry. Each year over three-quarters of a billion dollars were neither committed to tribal contractors nor restricted by annual appropriations Act earmarks. Thus, the Court is not faced with anything like the hypothetical situation discussed at oral argument (where the Secretary has "a billion dollars and the Secretary enters into contracts that pledge out 2 billion dollars"). Supp. Add. 15 (Judge Clevenger).

3. The foregoing discussion reaffirms the Cherokee Nation's opening proposition: (1) each year the agency had a lump-sum appropriation "to carry out the Indian Self-Determination Act" that contained no caps on tribal contract payments; (2) each year the entire portion of the appropriation that was neither statutorily earmarked to restricted purposes or committed to other tribal contracts was legally available to pay the Appellee's contract;[7] (3) each year these unrestricted amounts exceeded three-quarters of a billion dollars; (4) accordingly under Blackhawk, each year the Cherokee Nation's right to be paid vested in full as a matter of basic appropriations law; and (5) as government counsel candidly conceded at oral argument, Supp. Add. 13, under *United States v. Winstar*, 518 U.S. 839 (1996), vested contract rights could not later be annulled by Congress.

4. The foregoing discussion fully answers the Court's question. Before closing, however, we wish to discuss briefly the Secretary's Supplemental Brief. (With the exception of a chart prepared by government counsel, the parties have

[7] *See LTV Aerospace Corp.*, 55 Comp. Gen 307 (1975) and *Matter of Forest Service*, B-231711, 1989 WL 240615, at *2 (Comp. Gen. Mar. 28,1989).

cooperated in sharing with one another the documentary materials each would be presenting to the Court.)

The Secretary's presentation unfortunately does not come close to answering the Court's question. Recall that when government counsel stated her misunderstanding that "You would like to have a brief addressing the question of whether or not there are actually any funds left over in each one of these fiscal '[years]," Judge Clevenger corrected counsel by adding "[that are] not otherwise pledged to contract obligations." Supp. Add. 24. But the Secretary's brief does not address the amounts "not otherwise pledged to contract obligations." Instead, the Secretary's new proof returns to the same theme unsuccessfully advanced below: that each annual appropriation was eventually spent on something.[8] (We use the word "spent" loosely, because some of the hundreds of millions of dollars the Secretary's documents show as "unpaid obligations'' may well have later been "deobligated," and so not actually spent at all.[9]) But more to the point, the issue of full spending is legally irrelevant. If the Cherokee Nation's contract rights vested - that is, if (as demonstrated above) Congress enacted appropriations legally available each year to pay the Cherokee's contracts in full at the time the payments were due—under *Blackhawk* the Secretary's decision to spend his appropriation in other ways, instead of "reprogramming" to the extent necessary to pay these contracts, is simply no defense. So long as Congress did not

[8] *But see* Answering Br. 17 and Add. 259, 264, 268 (President's Budgets reporting "unobligated balance[s] available" years later); JA 482-83, ¶ 26 (noting "$1,406,176 unobligated from its [IHS] appropriation for fiscal year 1996 at the end of the fiscal year"); IHS Budget Justification Tables for FY 1994, FY 1995, and FY 1996, reporting the same left-over sums as the President. Supp. Add. 28, 31,34.

[9] APPROPRIATIONS LAW, at 7-51-52. *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY 1994), dated 11/8/94 (sheet 13 of 77, line 13C), indicating $296,388,162.75 as the "Net unpaid obligations, Obligated balance."

alter the legal availability of the appropriation before each payment was due, under *Blackhawk* the payment rights vested.

Alternatively, the Secretary's new documents may be intended to go beyond the Court's narrow question and shore up the government's insufficient showing under the ISDA's "reduction clause." But if so, it again fails on the precise same counts the proof below failed, *see* Answering Br. 49-54, for: (1) it fails to answer how using unrestricted annual *increases* in appropriations could have forced *reductions* in ongoing programs serving other tribes; (2) it fails to fully disclose which portion of the agency's annual spending was *not* on a program serving other tribes; and (3) it fails to answer how using leftover year-end unobligated balances would have forced reductions anywhere. Indeed, on the second point the same IHS Budget Justifications (like the proof below) reveal that IHS annually held back between $43,588,000 and $49,471,000, not for "programs serving a tribe" (the language of the "reduction clause"), but for its own federal functions-its so-called "Direct Operations"[10]-conduct that both falls outside the narrow "reduction clause" and violates the direct statutory prohibitions on contract reductions set forth in 25 U.S.C. §§ 450-l(b)(l), (3) & (4). And on the third point, even the Secretary's cryptic documents continue to show substantial "[u]nobligated balances available" at the close of each year.[11]

CONCLUSION

The Secretary's proof below and his own public documents show that the Secretary's defense of unavailable appropri-

[10] Supp. Add. 27, 30, 33 (lines entitled "Direct Operations"); *see also* JA 487 (line entitled "Direct Operations", column entitled "FY 1996 Appropriation") (identifying $42,970,296 allocated to this purpose as of September 30, 1996).

[11] *See, e.g.*, SF 133 for period ending Sept. 30, 1994 (FY 1994), dated 11/8/94 (sheet 13 of 77, line 9A) ("$6,841,390.01").

ations fails, and that the Cherokee Nation's contract rights vested fully upon enactment of each appropriation. There were no caps on contract payments for "ongoing" contract support costs. And as the Secretary correctly concedes (and consistent with the views of the Comptroller General and the General Accounting Office ("GAO"), Office of Legal Counsel), there were also no caps on contract payments for "new" contract support costs.[12]

For the foregoing reasons, and those set forth in Appellees's prior submissions, the Board's decision below should be affirmed.

Respectfully submitted this 24th day of April 2003.

SONOSKY, CHAMBERS, SACHSE,
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---

[12] As discussed at oral argument, this is because the term of art "shall remain available" does not create a cap. The Tenth Circuit's contrary conclusion erred by relying on a different term of art in appropriations law, while also overlooking that the cited GAO authority references *approvingly* the Comptroller General's conclusion that the *same* term of art at issue here is "neither [a] maximum nor minimum limitation on [the] amount available for a particular object." APPROPRTATIONS LAW, at 6-8 (citing *Forest Service* as "B-231711") (Supp. Add. 38). And without any cap, the rule that a specific appropriation takes precedence over a more general appropriation (Reply Br. 7 n.4) is irrelevant, as is the 'excess contracting' hypothetical disproved herein.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief has been served on the following attorneys or parties of record this 24th day of April 2003 by overnight mail:

JEFFRICA JENKINS LEE
BARBARA C. BIDDLE
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/s/ CHERI TABOR
CHERI TABOR

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-1286

TOMMY G. THOMPSON, SECRETARY OF HEALTH
AND HUMAN SERVICES,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

Appeal from the Department of the Interior Board
of Contract Appeals in No. 3877-3879/98,
ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

CERTIFICATE OF INTEREST

Counsel for the Appellee, Cherokee Nation of Oklahoma, certifies the following:

1. The full name of every party or amicus represented by me is:

Cherokee Nation of Oklahoma

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Cherokee Nation of Oklahoma

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

not applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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April 23, 2003

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* Highlighting has been added for ease of reference to the sections referred to by Appellee.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINSTRATIVE CHIEF JUDGE BERNARD V. PARRETTE

AFFIDAVIT OF LLOYD B. MILLER IN SUPPORT OF APPELLEE'S SUPPLEMENTAL BRIEF

STATE OF ALASKA)
) ss:
THIRD JUDICIAL DISTRICT)

LLOYD B. MILLER, being first duly sworn upon his oath, deposes and says:

1. I am counsel of record for the Appellee Cherokee Nation in the above-captioned case.

2. Oral argument was held in the above-captioned case on April 9, 2003 at the Carl B. Stokes U.S. Court House in

Cleveland, Ohio. The Federal Circuit made an audiotape recording of the oral argument, which was then sent via Federal Express to my office.

3. Under my supervision the audiotape was transcribed by Peggy Crowe, a legal secretary in our law firm. Having listened to the audiotape while reviewing the transcript, and having thereafter made corrections to the transcript, I believe the attached transcript accurately reflects what is contained on the audiotape recording of the oral argument.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Dated this 22nd day of April 2003.

/s/LLOYD B. MILLER
LLOYD B. MILLER

SUBSCRIBED AND SWORN to before me this 22 day of April 2003.

/s/ PEGGY S. CROWE
PEGGY S. CROWE
Notary Public in and for Alaska
My Commission Expires: 7/29/06

Appellee's Transcript of Oral Argument
held April 9,2003

HHS v. Cherokee Nation of Oklahoma, No. 02-1286

Judge Clevenger:

The panel has before it five cases, in four of which we are going to hear oral argument and in the fifth case a decision will be made on the basis of the briefs alone. Let me identify the cases for the record: 02-1286, The Department of Health and Human Services against the Cherokee Nation of Oklahoma; 02-1361, Nutting against Ram Southwest; 02-5134, Obadele against the United States; 02-1477, Inamed Corporation against Kuzmak; the case that will be decided on the briefs is 03-3093, King against the Department of the Navy. Now the court assumes that all counsel have been informed about the way in which the lighting system works. When the yellow light goes on, you're beginning to consume your rebuttal time, when the red light goes on, you're finished your time. Those of you who have not appeared in front of this court before, at least not in front of this presiding judge, you should know that if your, some or most of your argument time has been consumed by questions from the bench, the court tends to be generous in awarding you your rebuttal time notwithstanding the fact that we may have run over. I don't want you, if you haven't appeared before me before, I don't want you to be nervous if you see the yellow light come on and you're afraid that you're going to lose your rebuttal time. If the court has exhausted your direct time, we understand that. The first case is Health and Human Services against Cherokee Nation of Oklahoma. Ms. Lee, I understand you're going to reserve three minutes for rebuttal.

J. Lee:

That's correct Your Honor.

Judge Clevenger:

Further, counsel should correctly assume that the members of the bench have read your briefs with great care and are quite familiar with the facts, as well as the legal arguments so if you intend to spend a fair amount of your oral argument time talking about the facts that's your choice, but you would be better advised to proceed to the merits of your argument.

J. Lee:

May it please the court, Jeffrica Jenkins Lee from the Department of Justice here on behalf of the Secretary of Health and Human Services, the appellant in this case. The dispute here centers on the proper interpretation of the concluding clause of ISDA section 450j(l)(b) which conditions the funding of all aspects of self-determination contracts on the availability of appropriations. At issue is whether the Cherokee Nation is entitled to full payment and funding of its contract support costs for fiscal years 1994 through 1996, even though Congress failed to appropriate sufficient appropriations—

Judge Clevenger:

Do we know whether the contracts at issue are concerned with continuing contracts or are they new and expanded contracts?

J. Lee:

Well, there's, both issues are present here, Your Honor.

Judge Clevenger:

Both kinds of contracts?

J. Lee:

Both, both kinds of contracts. There was, the contract support costs that Cherokee is seeking additional

funding on involves the new or, new and expanded programs on contracts that they had operated before, as well as CSC for ongoing contracts.

Judge Dyk:

Do I understand that the government concedes that there's no legal restriction on HHS using reprogramming authority to spend more funds for the support costs than it elected to do?

J. Lee:

Well, our position is that under the statutory language as it existed, there's, in the appropriations language, there was no statutory cap as that term of art is used.

Judge Dyk:

So there was no legal limit imposed by the appropriations legislation.

J. Lee:

That's correct Your Honor.

Judge Dyk:

So, how is it then that the Secretary of HHS can say there's no legal limit, but I've made a choice not to make these payments under the contract? Why, why does the discretionary choice of the Secretary of HHS means that, means that funds weren't available within the meaning of the statute and the contract language?

J. Lee:

Well Your Honor, the Secretary believed that he had some limited discretion to allocate the funding that Congress made available. Now Congress in its committee reports recommended that various amounts be spent on certain projects, not only for contract support costs, but for the delivery of health care services to the Tribes.

Judge Dyk:

And that wasn't binding on him?

J. Lee:

It was not binding, but as the Tenth Circuit recently held in the Cherokee Nation case, involves the same Tribe with a different contracting year, that it was reasonable for the Secretary to not just completely ignore what the recommendations were in the committee report and to to use this limited discretion to apply those funds to the areas in the amounts that Congress had recommended or that the committees had recommended.

Judge Dyk:

So what you're doing is you're reading availability of funds to mean available in the Secretary's discretion?

J. Lee:

Well, no, not not really entirely, Your Honor, there are programs that the the Secretary has to fund, not only the Cherokee Nation's contracts, the Secretary has a responsibility to provide health care programs to non-contracting tribes. There are over 150 programs that either the Secretary directly operates or various other tribes operate on behalf of the Native Americans and Alaska Natives and the Secretary under statutory mandate is to make sure that all these tribes receive adequate funding for the delivery of health care services and not reduce any of those fundings to those tribes in order to pay full CSC. There's nothing—

Judge Dyk:

Well, that's the other, that's the other part of the provision here, that's not the availability of funds part.

J. Lee:

No, no, Your Honor, but but well they're related. It's all one clause. The Cherokee Nation chooses to kind of divide this up into two two different clauses, but it's all

one one one sentence there-the contracts are based on the availability of funds and

Judge Clevenger:

Well there are funds that are available, the Secretary just chooses not to pay them to the Cherokee Nation.

J. Lee:

Well, the Secretary is under a statutory obligation to all the tribes to—

Judge Clevenger:

I understand that, but I mean there are funds, if the Secretary wished, he has sufficient funds in the overall appropriation to pay the Cherokee Nation their contract support costs.

J. Lee:

Well not the Cherokee—

Judge Clevenger:

Isn't that, that's true, isn't it?

J. Lee:

No, Your Honor, because the Cherokee Nation's requests fell lower on the Queue than the other tribes who had requests that were greater than theirs and there's nothing in the statute that says that their, that their entitled to payment ahead of all these other tribes.

Judge Clevenger:

Okay, you have to help me out. Are you saying that all of the, all of these other tribes to which, which are being paid instead of the Cherokee Nation, they all have contracts with HHS also?

J. Lee:

They're on, the tribes that are on the Queue have—

Judge Clevenger:

But they're all under, all under contract?

J. Lee:

They're all under contract and the Cherokee Nation who I believe was number 17—

Judge Dyk

There were surplus funds at the end of the year, right? - millions of dollars of surplus

J. Lee:

Well according to the record evidence, the record evidence is only with respect to fiscal year 1996, and the Fitzpatrick Declaration, Mr. Fitzpatrick was the Director of Financial Management, said that all funds had been allocated at the beginning of the fiscal year and only minor unobligated funds were left at the end of the year.

Judge Clevenger:

I need some help. Let's just assume that there's, that there was an appropriation of a billion dollars for the costs, the medical costs for all of these contracts, right?

J. Lee:

Those contracts—

Judge Clevenger:

Let's just, yeah, let's just arguendo assume that is was a billion dollars, and let's assume that the Secretary here did the contracts with various tribes and/or nations just like the ones here, and the contracts all ended up with two billion dollars worth of contract service costs for the year of appropriation. Your point is that the Secretary is free to decide which contracts get paid and which don't?

J. Lee:

The way that it, that, because there was chronic under-funding of contract support costs, the Secretary developed a method for dealing with—

Judge Clevenger:

Chronic under-funding of contract support costs is not what I'm talking about. I'm talking about the overall program costs.

J. Lee:

Well, the tribes have received their funding for the direct operation—

Judge Clevenger:

I understand that.

J. Lee:

of the programs, we're just talking about the administrative costs, overhead costs, and they receive their full funding for the operation of the program, the actual delivery of health care services, and with respect to the ongoing contracts, once they have received that funding, they've received no less than what they received in the previous year, so they would be guaranteed that as their base funding and it's just the additional overhead costs in—

Judge Clevenger:

I'm, I'm still confused as to whether there's any money available to pay. I mean—

J. Lee:

No, there's no money to pay because the budget is allocated at the beginning of the, of the fiscal year. What happens is that the the Secretary makes a request to Congress as to, they look at what was spent on all of these different programs in a prior fiscal year, and then in the, for the coming fiscal year they request funding for each one of those programs based on what their history of funding has been in prior years. Congress may decide, well we want to give more money to this program than the Secretary has recommended.

Judge Clevenger:

I can understand that, but we're dealing with three years and we're not dealing with whether Congress is going to appropriate money tomorrow to pay for these contracts, we're dealing with three old years, aren't we?

J. Lee:

Right.

Judge Clevenger:

And the question, and there was something in the magnitude of billions that were appropriated for medical costs.

J. Lee:

Right, and it's not only the contract—

Judge Clevenger:

And there were some marks in the committee reports where the committee to Congress-people were saying, well we think maybe something in the magnitude of millions, 200 million dollars should go for continuing contract support costs and up to 7.5 or something for new and expanded. Right?

J. Lee:

That's right.

Judge Clevenger:

But you've now said that those marks in the committee reports and the 7.5 in the statute aren't caps; they don't, they don't restrict the Secretary from paying more. So as Judge Dyk said, if you're not restricted, and you're simply using your discretion to decide which tribe gets paid, how can you exercise that discretion in derogation of a contract right? Where does the Secretary get the authority to say, ["]well, I entered into a contract, I promised to pay the Cherokee Nation's contract support

costs and I have the money to do so, but I don't feel like doing it?["]

J. Lee:

No, that that's not what the Secretary's argument is. The Secretary is saying that he has other statutory mandates, and it's not only the Indian Self-Determination Act contracts that are funded by the lump sum appropriation, but there are other programs under the Indian Health Improvement Act, the Snyder Act, that the Secretary is responsible for funding. So the lump sum appropriation that Congress makes to the Secretary, as I was saying, was based on the Secretary's request based on what prior year funding had been and what Congress decided that they should spend in a particular year. And then

Judge Dyk:

But, didn't he have the authority to move the funds around?

J. Lee:

Well, we're saying that the Secretary was not prohibited fiom reprogramming, but the Secretary wasn't required to, because if—

Judge Dyk:

But he was required to by the contract. I mean, can it possibly be that when the contract talked about ["]subject to the availability of funds["] that it was talking about subject to the Secretary's discretionary choice as to—

J. Lee:

Well—

JudgeDyk:

Wait, wait, wait, as to how to use the funds? And in that respect, how do you distinguish the Blackhawk case?

J. Lee:

Well, in the Blackhawk case there was no, there was, the language of the agreement was not contingent on the availability of sufficient appropriations, and here the cont—, the sec—, the tribes contracted with knowledge that they wouldn't get their full funding unless there was sufficient appropriations and they knew at the time that they contracted that there was already deficits, there were already shortfalls in contract support costs, and they contracted with knowledge of that and, in fact, requested it be put, to have their contract support costs paid out of the ISD fund, which is the priority list.

Judge Clevenger:

Are you saying that, in a given hypothetical, the Secretary has in a given year let's say a billion dollars to spend for the purposes we're talking about for these contracts, and in that year it turns out that the Secretary has got 1, say 2 billion dollars worth of contract obligations, and then the Secretary spends the billion dollars at his discretion using a queue deciding, cause he had the same problem in years past, and so if you were gipped in years past you go up the ladder on the queue, and so the Secretary simply has the authority from year to year to continue sort of a Ponzi scheme to pay off the contracts. Is that what it is?

J. Lee:

Well, Your Honor, it's not a Ponzi scheme, but but the, this was a procedure that was developed by the Secretary in consultation with the tribes as a way of dealing with these shortfalls in appropriations, and the thing is that the tribes were eventually paid their contract support costs, although they might not have been paid in the fiscal year that they first requested funding, but it's not—

Judge Clevenger:

Is the Cherokee, is the Cherokee Nation standing in a queue now? Is it in a queue, where next year or some year after it can gobble up some appropriations from a later year?

J. Lee:

Well, the funds for, the queue system is no longer in effect, but at the time that they were placed, at the time of these fiscal years, there was a queue in place.

Judge Dyk:

They haven't been paid, they haven't, I mean

J. Lee:

No, they have not been paid.

Judge Dyk:

They're saying we ought to be paid,

J. Lee:

That's what they're saying.

Judge Dyk:

and my question is why is this different from Blackhawk because, in fact, Blackhawk had language in it, in the contract, ["]contingent on the availability of appropriated funds from which payment in full can be made["] and to me, that language looks very much like the language we're dealing with here. We held in Blackhawk the government couldn't welch on the contract. Why isn't the same result followed here?

J. Lee:

Because here the appropriated funding had already been allocated bef—, to other programs and the CSC funding had been already spent before we got to Cherokee's place on the queue and they—

Judge Clevenger:

All of the money, all of the, in the billions of dollars of the appropriation had already been pledged?

J. Lee:

It had been, except for for some unobligated funding. Now Cherokee—

Judge Clevenger:

What do you mean?

J. Lee:

Some unobligated amounts, the, it was the practice of—

Judge Clevenger:

Why couldn't those unobligated amounts be used to pay the Cherokee?

J. Lee:

Well, it was my understanding that these, it is my understanding that these unobligated amounts are held back so that they can be paid out for some type of like emergencies that might come up during the fiscal year and as far as—

Judge Clevenger:

So there was money, adequate money, to pay these contracts?

J. Lee:

No, no, there was not. It's my understanding, and the record doesn't—

Judge Clevenger:

Well how are we going to get to the bottom of that? It's the, it's the heart of the case because the government has, I gather different from the position you took in the Ninth and Tenth Circuits in earlier years, there are no caps here at all, it's solely a matter of the Secretary's discretion,

J. Lee:

Well, Your Honor—

Judge Clevenger:

and if there's any money left, if all the money is gone and is pledged pursuant to a contract, and the Secretary is simply trying to decide which contract to argue [sic], the contract, the Secretary made a mistake and entered into too many contracts, if you will. Maybe there's nothing we can do about that, but if there's any money left, you have almost no argument to, to sustain refusing to pay it over. How do we find out for sure whether there's any money left in the general appropriation?

J. Lee:

There are several points in what you say Your Honor that we'll respond to. First of all, with respect to the Ninth Circuit and the Tenth Circuit cases, there was not a statutory cap. It's the same, exact same situation that's involved here. There was no specific cap in the appropriations bill itself, yet the Ninth Circuit and the Tenth Circuit both found that based on the language in those appropriation acts, and the committee reports, that the Secretary was, was, it was legal for the Secretary to have appropriated the contract support costs in the way that they did and found that there was no money left. Now in the 1996, which is one of the fiscal years that was at issue here, that was the same fiscal year that was at issue in the Ninth Circuit case and the Ninth Circuit found that all the money was gone and there was, that there was nothing left to pay.

Judge Dyk:

Well, they interpreted the statute as imposing a statutory cap relying on committee reports, right?

J. Lee:
And on Section 314 that—

Judge Dyk:
They decided the case on a ground that the government is no longer willing to support, isn't that correct?

J. Lee:
Well, we, we, the Ninth Circuit found that there was a statutory cap that that could have been ambiguous whether or not there was a cap and that Congress cleared up any ambiguity in section 314. We had never—

Judge Dyk:
But you're not even, you're arguing that any more. You're not arguing, you began the argument by saying you're not arguing there's a statutory cap.

J. Lee:
Well, it's the same argument that we made in the Ninth Circuit and Tenth Circuit. We've consistently argued that based on a strict reading of the language that this did not qualify as a statutory cap. What we're saying is that Congress through, as Congress clarified really what Section 314, that they did intend for these amounts to be a cap on the amount that would be spent.

Judge Clevenger:
You disagree with that.

J. Lee:
Do we disagree?

Judge Clevenger:
You disagree with that. You say they are not caps.

J. Lee:
No, we were saying that under the precise language that was used that—

Judge Clevenger:
Well, that's right, but—

J. Lee:
the courts have held to be a statutory cap in the past, but that the Sec—

Judge Clevenger:
If, if, if, if the statutes didn't contain caps then 314 doesn't create caps in the statutes that didn't have them, right?

J. Lee:
Well, we're saying that section 314 clarified what Congress intended.

Judge Clevenger:
Which was?

Judge Lee:
That, that there actually be, that what they, that there be a cap, that what they appropriated to the agency and what they earmarked in committee reports that that would act as a cap, that that was all they intended to be spent.

Judge Dyk:
Are you arguing that there's a cap or not a cap? I'm confused. I thought you began the argument by saying there wasn't a cap.

J. Lee:
I'm sorry that, that, that I confused the Court because our position is that what in effect happened was that Congress clarified it and intended it to be a cap. When it, when the appropriations language—

Judge Dyk:
Is there a cap or isn't there a cap? Is there a statutory cap?

J. Lee:
Yes.

Judge Dyk:
Yes?

J. Lee:
Section 314 clarified that all Congress intended to be spent on—

Judge Clevenger:
So its your—

J. Lee:
contract support costs was the amounts that were recommended in the committee reports and the amounts that were actually appropriated.

Judge Dyk:
I thought your brief said there wasn't a cap.

J. Lee:
We said that there wasn't a cap under the language of, the way the courts have interpreted—

Judge Clevenger:
You, you, you say in footnote, footnote—

J. Lee:
that the legal term, a legal, it's a legal term of art.

Judge Clevenger:
footnote 17 on page 33 says in order for there to have been a statutory cap the language would have to read not to exceed. This is not a cap you say.

J. Lee:
For what? This is not a cap in the sense of the precise language that courts have said, you know this is a cap. But the courts have, the Ninth Circuit, the Tenth Circuit have interpreted, and we agree with the holdings in in those courts, and we make the same arguments here that

we made in those cases and we will submit that the Cherokee Nation case, the Tenth Circuit,

Judge Clevenger:
Let me just make, let me make one point and, cause we're going to have to move along. The, assuming that Section 314 does indeed convert what you say is not a cap into a cap, right?

J. Lee:
Yes, Your Honor.

Judge Clevenger:
That, that's your argument now, and you're, and 314 converts the marks in the, in the house reports into caps, correct?

J. Lee:
That's correct.

Judge Clevenger:
That's the same thing? Okay, and if that is retroactive, right? And if the contract rights vested before section 314 was enacted then you concede error under Winstar, don't you?

J. Lee:
No. Your Honor.

Judge Clevenger:
If, I said if the rights had vested

J. Lee:
Oh, if, if the rights had vested.

Judge Clevenger:
If the rights had vested?

J. Lee:
But we do not concede that the rights vested because the the tribes contracted with knowledge that it was, that their complete, their funding would be subject to the

availability of appropriations. The contract language included—

Judge Clevenger:

Part of the problem is that you're arguing both sides of the fence. You're saying, you started off by saying the whole case depended on the Secretary's discretion. The Secretary's a decent person, if the Secretary has two contract obligations equally valid, he has the choice of deciding which one he wants to pay. Now you've said, no that's not it at all, it's all subject to a cap and I suppose everybody agrees there's no money left under the House marks or under 7.5 million to pay. So I'm confused.

J. Lee:

Well, our position is that, at the time that the Secretary acted in those fiscal years, the Secretary was not reading the the language in the appropriations bills as being a, you know, a mandatory requirement, but the Secretary was aware of the consequences to the agency if it did not follow the suggestions of the committee report and it allocated the funding based on the recommendations in all those reports.

Judge Clevenger:

Is your argument that the Secretary's discretion to pay under one contract and, instead of under the other, frustrates vesting of contract rights?

J. Lee:

Well, it, the, the, our position is that they didn't have a vested right under the statute or in their, they had no vested right under the statute or under their contract because they knew that the funding was, was subject to the availability of appropriations, and they also knew that there had been chronic under funding of these, of the contract support costs and they contracted with

knowledge of that, and they really should not have expected that they would be paid their full contract support costs and—

Judge Clevenger:

They shouldn't have trusted the Secretary.

J. Lee:

certainly not ahead of all these other tribes and at the beginning of the year. I'm sorry?

Judge Clevenger:

They shouldn't have trusted the Secretary?

J. Lee:

I'm sorry, Your Honor?

Judge Clevenger:

They shouldn't have trusted the Secretary. They should have known better.

J. Lee:

Well, if both sides knew how the program, how the system operated and the, and the Cherokee Nation had been contracting for several years with the Secretary. They knew that they would eventually get their money. The Secretary has to enter into a contract when a tribe by a tribal resolution requests that the Secretary enter into a contract, and so the Secretary, it's up to the tribe to decide whether or not it wants to to contract and it knew when it contracted how CSC had been dealt with in the past and, in fact, many of the tribes were involved with the development of the pro—, of the ISD manual where this priority system was developed.

Judge Clevenger:

Thank you very much. We ate, we ate up all of your rebuttal time, we'll restore your rebuttal time. Mr. Miller.

L. Miller:

Thank you Your Honor and may it please the Court. This case tests the application of the rule that the government in its contracting relations is to be governed by the same rules that apply to private contracting parties, and we say that for two reasons. Number 1—

Judge Dyk:

. . . that's backwards, I mean private contracting parties don't have contracts subject to the availability of funds. It's not the same; it's a different—

L. Miller:

Once an appropriation is enacted by Congress, that contingency is over. It has been met. The government here argues that that's not enough. It also has the right, as the dialog with the bench indicated—

Judge Dyk:

You had a special problem here with respect to government contracts, and special language in here which we have to construe, so it's not just a question of saying they're bound like anybody else.

L. Miller:

Well, once a right vests under a contract, a private party, no more than the government, could come back five years later and declare that the appropriations which had been legally available in 1994 were not legally available after all, and so Congress tried to do in 1998 at the behest of the Agency in the wake of litigation which had found the government liable under a similar contract in a different case.

Judge Clevenger:

What happens if the overall appropriation for a given year for the health services is a billion dollars and the Secretary enters into contracts that pledge out 2 billion dollars. So the Secretary's got 2 billion dollars worth of

contract obligations and he's only got a billion dollars to pay it with, and so he's got a system and he says what I do is I've got a ranking, a ranking order, and if you got gipped, if you're one of the, of the contract parties that didn't get paid in year 1, you go up the ladder so next year when the same problem happens again cause Congress never gives me enough money for this stuff, you'll get paid later on.

L. Miller:

Yes, Your Honor.

Judge Clevenger:

Now, let's assume that's the situation and you're one of the parties that didn't get paid in the fiscal year cause the billion dollars got ate up before they got to your bill. Do you have a gripe?

L. Miller:

There would be rules to apply in that situation, Your Honor. If the entire appropriation was committed to contracts, appropriations law permits the Agency to make reasonable decisions amongst the contractors.

Judge Clevenger:

[inaudible]

L. Miller:

The Ramah Navajo School Board decision from the D.C. Circuit says that in that situation, which was present there, the Agency is under an obligation to fund all of the contractors as much as possible, thus a pro rata payment to the contractors would be in order. But that's not what happened here, on two scores.

Judge Clevenger:

In pushing Ms. Lee, I understood her to be saying that the money is all gone.

L. Miller:

Your Honor, the problem with the hypothetical is that it's not actually what happens. Only about a third of the IHS system is contracted. Fully two-thirds of the system isn't subject to any contract, any mandatory payments under contracts at all. Only about a third—

Judge Dyk:

Where do we find that in the record?

L. Miller:

I don't believe that data is in the record Your Honor, either way. I, forgive me, Your Honor, I do believe that in the, possibly the Cesari affidavit or the Fitzpatrick affidavit has data about the volume of contracting by the Agency. I would have to double check the record Your Honor. The bulk of the Agency is consumed by direct services by the Agency to tribes and administrative overhead costs of the Agency, federal functions, secretarial administration—

Judge Dyk:

How are we supposed to know that?

L. Miller:

Oh, I can show this to you Your Honor on page, in the record, page 487 of the Fitzpatrick affidavit, it has a line item budget that talks about clinical services, preventive health services, and direct operations. Now the direct operations are the Agency's—

Judge Clevenger:

Wait, wait, wait, 487?

L. Miller:

487 Your Honor. (Pause.) Now the government spends the bulk of its defense in this case on the reduction clause. It's not really about availability, as I think the colloquy with the bench indicated, it's about the

reduction clause. In paying us would they have been forced to reduce the programs—

Judge Clevenger:

Tell us how to read this.

L. Miller:

Okay. We have two parts, and I'll hold it up Your Honor, it's split, it really runs across this way, but they put the second part of the table on the bottom. On the top part you see clinical services and then each of the 12 Area Offices running across the top, so you have the Aberdeen Area, the Alaska Area, the Albuquerque Area, and so on. How much is allocated to all of those, each of those areas for clinical services, hospitals and clinics, dental, mental health and so forth. Then there's another type of health care called preventive health services—public health nursing, health education and so forth. That takes care of the services. And I know Your Honor that about a third of those services are contracted by tribes, we're looking for it in the record. Then—

Judge Dyk:

So everything above the line is obligated under contract to the various tribes?

L. Miller:

No, Your Honor. A third of what is above, a third of what is, below the line and above the line is the same chart Your Honor, it just extends for six more areas.

Judge Dyk:

A third of it, how do we know?

L. Miller:

Excuse me. (pause) Yes, you see right, the middle line of the page it says ["]Nashville, Navajo, Oklahoma, Phoenix, Portland, Tucson.["] It's just a continuation of the top part of the chart.

Judge Dyk:

Okay, but how do we know that the amounts at the top part, that only a third of those are—

L. Miller:

We are locating that in the record Your Honor. I'll have it for you in a moment. Then you have, so you have those services, those are the, actually the health care services and then you have the Agency, like any agency has direct operations to run their Headquarter's offices, their Area Offices, what you see in this year was 42 million dollars.

Judge Clevenger:

Just so we don't eat up a whole lot of time in the argument, the panel would like to have supplemental briefing from both sides to be submitted no less than a week after today, if that doesn't cramp you too much, and I assume it doesn't, on this point about whether there were funds available. We're talking about whether in the given year, was there money that the Secretary could have used to pay the bills that you submitted to it.

L. Miller:

Well, let me, let me address—

Judge Dyk:

Without violating the contract obligations to other tribes.

L. Miller:

Absolutely Your Honor, but perhaps in the balance of my presentation Your Honors will find that may not be necessary for the following reasons: This came up on summary judgment before the Interior Board of Contract Appeals. There are three contract years at issue-'94, '95, '96. The government said it didn't have to pay because it would have been impossible for the government to pay without reducing services to ongoing tribes. Okay, the government has the burden to prove that defense. They

offered no evidence on '94; no evidence on '95. Under Celotex, when the government has the burden to prove its defense, and the movant has moved for summary judgment—

Judge Dyk:

Have they offered evidence on '96?

L. Miller:

I'm going to get to '96 Your Honor. So in '94-'95 they're gone. '96, what did the government do? What are the facts as to 1996? It is in the record, that the, and the court can take judicial notice in the briefs as well, that the appropriation was increased in 1994 by 88 million dollars, the appropriation was increased in 1995 by over 50 million dollars. The significance of that is that the appropriation, lump sum in kind, not restricted in any way, could have been used to pay the million, two million dollars that was owed this contractor to carry out this government contract without reducing one penny of any ongoing program serving any other tribe.

Judge Dyk:

How do we know? How do we know?

L. Miller:

Because it was new money Your Honor.

Judge Dyk:

Well how do we know that? Where does the record tell us [inaudible].

L. Miller:

It's in the record, in the, in the Addendum to the brief is the appropriation, the lump sum appropriation for 1993, appears in the briefs

Judge Clevenger:

'93?

L. Miller:

On page 49. And that appropriation for the Indian Health Service was 1,537,000,000 dollars. The appropriation for 1994 is in the Addendum on page 65 and the appropriation there was 1,526,000,000 dollars, and the appropriation for the Indian Health Service for 1996 appears on page 65, excuse me, the middle one was 57.

Judge Clevenger:

Those are the billion dollar sums?

L. Miller:

Those are the lump sum appropriations.

Judge Clevenger:

In the billions?

L. Miller:

Yes Your Honor, that were legally available.

Judge Clevenger:

Yeah, we got that.

L. Miller:

So one only has to do the math from one appropriation to the next to see how much in new appropriations were made by Congress to this Agency to meet its obligations, including mandatory obligations.

Judge Dyk:

How do we know that those funds weren't obligated under contract to other tribes? Now, you can talk all you want to about the size of the appropriation, but unless we know that those funds were available to be reprogrammed, we don't know whether your point has merit or doesn't have merit.

L. Miller:

My, my point to Your Honor, is that although we certainly will provide the briefing, the burden was on the government, not on us. It wasn't on us to disprove their

defense, it was on the government to prove their defense. Number 1, there were new—

Judge Clevenger:

In other words, this case should turn on the burden of proof? That's what you want us to do?

L. Miller:

Well, the government does have a burden. It didn't meet its burden, that's what the Board ruled below. But, let me take us beyond that. Let's look at the government's proof. I mean, I think that's the only thing the Board, the Court can do, is look at the government's proof in the context of the summary judgment which they lost. The government's proof, number 1 about the increased appropriations. Then there is, of course, the left-over balances from the President's Budget, we know left-over balances of up to 76 million dollars in 1996.

Judge Clevenger:

That's not in the record either, right?

L. Miller:

The Court can take judicial notice of the President's budget to the Congress

Judge Dyk:

It's not in the record, is it?

L. Miller:

Pardon me.

Judge Clevenger:

It's not in the record.

L. Miller:

It's not in the record. No, Your Honor, we didn't know it at the time of the briefmg before the Board in 1998, but the Court must take judicial notice under Rule 201(d) of a document like the President's budget request. But, Number 3, let's just look at the proof and the statute. I'd

like to go back to the beginning of the government's presentation. They said the issue presented is the proper interpretation of the notwithstanding clause. Now we agree with that. How do you interpret the notwithstanding clause? Well there is one rule of interpretation that trumps every other rule this Court might apply. It's the rule that's in the statute, and in the statute section l(a)(2) of 450(l)(c) says "every provision of this' Act shall be liberally construed in favor of the contractor." That's a mandatory rule of construction. This notwithstanding clause that has an availability provision and a reduction provision must be construed liberally in favor of the contractor because Congress has so directed. Now, we've talked about the availability clause this morning. The government has conceded there is no cap and their concession is correct under Firefighters.

Judge Clevenger:

But isn't the government saying that section 314 converts the 7.5 and the committee marks into caps?

L. Miller:

That's exactly what the government says. The government says section 314 retroactively converts what was a lump sum appropriation into a capped appropriation, and under Winstar that's something the government cannot do. That is not a general act of Congress regulating its economic affairs, it's a specific repudiation of a contract.

Judge Clevenger:

How do we know that your contract rights vested?

L. Miller:

We know our contract rights vested because'—

Judge Clevenger:

That hasn't' been adjudicated, right? The Winstar issue hasn't been adjudicated at all with the Contract Board.

L. Miller:

Well, the Winstar plaintiffs didn't have to have a court ruling that good will was part of the value of their contract in order for good will to keep.

Judge Clevenger:

Right, I mean, we can't award a victory to you on Winstar, can we? We have to remand.

L. Miller:

I think—

Judge Clevenger:

If your contract rights didn't vest, then you sit down, you have no Winstar claim, right?

L. Miller:

Of course Your Honor. If the contract right—

Judge Clevenger:

So, assuming that 314 is retroactive, and assume that it converts noncaps into caps, then your victory has to be won on the fact that your contracts rights vested.

L. Miller:

Correct Your Honor.

Judge Clevenger:

And there's an argument about that and this isn't a trial court, that's a question of fact whether the contract law vested, whether the rights vested, isn't it?

L. Miller:

Well if Your Honors do remand the case, the Board below found that the contract rights had vested.

Judge Clevenger:

They did?

L. Miller:

If Your Honors disagree and remand the case, the Board below ruled that the contract rights had vested.

Judge Clevenger:

Where did they rule rule that? I don't recall that, but I, perhaps I'm wrong.

L. Miller:

The Board ruled that based on its opinion in Alamo, which it incorporated by reference, that a contract right contingent on the availability of appropriations vests once the appropriation is enacted by Congress, so long as Congress hasn't restricted the appropriation, not an appropriations committee, but Congress, so long as Congress hasn't restricted the use of the appropriation. Which, of course, is what makes this case so different from Oglala, which was another case the government relies upon heavily.

Judge Clevenger:

So your argument is that if we, if we decide in your favor on the availability issue, that automatically decides the vesting issue.

L. Miller:

I think that's correct Your Honor. That is correct.

Judge Clevenger:

And your contracts themselves did provide for, what was it, quarterly payments, something to that effect, each contract had specific terms.

L. Miller:

They had different terms. The original contract provided for quarterly payments. Then there was an addendum to the contract that provided for an up-front annual payment and Congress in 1994 provided for up-front annual payments, then their was an appropriations act provision that we cite in the brief that said all payments are deemed obligated at the time of the contract award.

Judge Clevenger:

If you come back to the hypothetical that I was framing that perhaps is inartful because I don't know as much about the workings of these programs as you and, and the government counsel. In my billion dollar hypothetical, you've agreed that if the Secretary had pledged off by contract 2 billion dollars worth of expenses, then you'd have to wait in line until some later period of time because the Secretary does have the discretion to rank who's going to get paid first?

L. Miller:

Ah, the

Judge Clevenger:

So, if that's so—

L. Miller:

I agree that the government has some discretion. I think the D.C. Circuit in the Ramah School Board case articulated the kind of discretion the government has.

Judge Clevenger:

So it does become very important for us in deciding your case to know, yes or no, whether there were funds that could have been paid to you non-pledged out [inaudible] funds.

L. Miller:

Right. A couple of points that I'd—

Judge Clevenger:

I think it would be useful if our request for additional briefing were honored, if both sides would give us within a week your best arguments on that point. Excuse me.

Judge Dyk:

10 days.

Judge Clevenger:

10 days.

Judge Dyk:
and 10 pages.

Judge Clevenger:
10 pages?

L. Miller:
Thank you, thank you Your Honor.

Judge Schall:
And if you make the charts

Judge Clevenger:
Within 10 pages.

Judge Schall:
And make sure that the charts are very clear and that there's no ambiguities or uncertainties, just really clearly trace it.

L. Miller:
Right. It's actually easily secured Your Honor, in the budget request that the Indian Health Service makes to Congress, it says this. So we will furnish those documents to you and Your Honors can make a de—

Judge Clevenger:
Well, well the reason why I and my panel would like some specificity here is it's hardly clear when you read the Ninth and the Tenth Circuit opinions that they really had a grasp on this exact issue, and certainly the feel in those cases is that the, that the courts felt that there were caps in the hundreds of millions dealing with continuing contracts and 7.5 with new or expanded and that, and that the money was gone

L. Miller:
Right.

Judge Clevenger:
within that cap site. So I don't know that there was ever any real focus on the question of whether if you blow off the caps, either as a result of rejecting 314 or directly, you still need to know is there money available.

L. Miller:
There is one aspect of the case, the government said it supports the Tenth Circuit, but it also said, Your Honor read back the concession in the briefs regarding the caps on new contract support costs. I just did want to take a moment to tell the court, the Tenth Circuit said that the Firefighters decision, which is a Comptroller General's decision which relied, which interpreted the ["]shall remain available["] language as not being a cap, that the Firefighters decision somehow didn't apply, it wasn't convinced that it applied. Two things about this: Number 1, the Firefighters decision involved this precise question: is ["]shall remain available["] language capping language, and ruled that it isn't. I guess three issues, three points. Number 2, the General Accounting Office treatise, the three-volume treatise, embraces that decision on page 6-8, Volume 6, page 8, of the General Accounting Office treatise embraces the Firefighters decision; and Number 3, the place where the GAO embraces the Firefighters decision is the same page that the Tenth Circuit cited to when it was discussing a different family of appropriations terms of art ["]shall be available,["] and I can understand the Circuit overseeing this, not not seeing this, because the citation to the Firefighters opinion was by case number, and not by name. But I wanted the court to appreciate the error and the embracing by the General Accounting Office of the Comptroller General opinion. My time is out, I don't know how much additional—

Judge Clevenger:

Thank you very much for your argument. Ms. Lee. You have your full three minutes if you need it.

J. Lee:

Well unless the court has further questions for me, I would just submit on our briefs and address the point that you raised in the—

Judge Clevenger:

Right, and you understand the, the, what we wanted by way of additional briefing?

J. Lee:

You would like to have a brief addressing the question of whether or not there are actually any funds left over in each one of these fiscal—

Judge Clevenger:

not otherwise pledged to contract obligations, right?

J. Lee:

that were not otherwise pledged, within 10 days of today and you said limited to 10 pages?

Judge Clevenger:

10 days and 10 pages.

Judge Dyk:

It's not a question, it's not limited to the question whether there were funds left over at the end of the year. The question is were there funds that the Secretary could have used to satisfy these contract obligations' that were not obligated under contracts with other tribes or otherwise restricted by the appropriations legislation.

J. Lee:

Alright. Thank you Your Honor for that clarification.

Judge Clevenger:

Thanks to both sides for the arguments.

[See JA Vol. II, PART 2 for Attachments 3-6]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,

Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,

Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

SUPPLMENTAL BRIEF OF APPELLANT TOMMY G. THOMPSON

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INTRODUCTION

This appeal involves a dispute over the amount of funding the Cherokee Nation (Cherokee) received from the Indian Health Service (IHS) for its contract support (*i.e.* administrative) costs associated with the Tribe's operation of various programs and services pursuant to contracts under the Indian Self-Determination and Education Assistance Act, in fiscal years 1994-1996. Oral argument was heard on April 9, 2003, before Judges Clevenger, Schall, and Dyk. During argument, the question was raised whether there were funds leftover in IHS's budget during the relevant fiscal years, and the Court directed the parties to simultaneously submit supplemental briefs addressing whether IHS had any unobligated appropriated funds that could be used to pay Cherokee's full CSC need, without IHS violating its contractual obligations to other tribes. The IHS now files this supplemental brief in accordance with the Court's request.

A. Congressional Appropriations and IHS Expenditures.

As discussed in our reply brief (at 15-19), the Secretary argued before the Board that IHS's lump sum appropriations were insufficient to pay Cherokee and all the other self-determination contractors on the queue, without requiring IHS to reprogram funds it had already obligated to other self-determination contractors, or to reduce funds from programs serving other non-contracting tribes. In support of these arguments, the Secretary proffered the declaration of Carl Fitzpatrick, then IHS's Director of Financial Management, which stated that IHS obligated all of the funds provided by Congress in the FY 1996 appropriation, "with the exception of some minor unobligated sums." Fitzpatrick Decl. ¶3 (JA Vol. II at 474). Mr. Fitzpatrick stated that IHS had $1,406,176 million[1] unobligated from its "Indian Health

[1] As on shown on Table 3-FY 1996 (*infra*, at Supp. Br. Add. 5a), it appears that there was a smaller unobligated balance of $1,253,280.64 in

Services" appropriation at the end of FY 1996, which was used to satisfy expenses that had been incurred during the course of the fiscal year and that were chargeable to the FY 1996 appropriation account. *Id.* at ¶ 25-27 (JA Vol. II at 482-83). The Secretary stated that he intended to proffer similar evidence with respect to fiscal years 1994 and 1995, if given the opportunity to do so by the Board. But the Board refused to conduct an evidentiary hearing (J.A. Vol. I at 27).

In response to the Court's inquiry at oral argument, IHS has reviewed its consolidated financial reports covering the annual (one-year) appropriations for the fiscal years at issue, in particular the Report on Budget Execution, Standard Form 133 (SF 133).[2] The SF 133 presents a "snapshot" of IHS's budgetary resources, obligations and expenditures at a given

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FY 96. Mr. Fitzpatrick also stated that the appropriation for contract support costs was filly distributed in each of the relevant fiscal years. Fitzpatrick Decl. ¶¶ 6-8 (JA Vol. II at 426). IHS's investigation now indicates that there may have been a very small unobligated CSC balance in FY 1996. It thus appears that the record may need clarification as to whether Mr. Fitzpatrick's statement that the funds were "distributed" meant that they were in fact "obligated." *See* 31 U.S.C. § 1501 (setting forth criteria to record obligations). As noted above, the Board refused to consider the factual availability of appropriations to satisfy Cherokee's request, instead focusing upon whether appropriations were "legally available." *See* JA Vol. I at 27. If the Court believes that these factual issues are relevant (but see Point B., infra), a limited remand to the Board might be appropriate to permit clarification of the record in this regard.

[2] The SF 133's for the one-year appropriations placed into IHS's Indian Health Services Treasury Account numbers 75 4 0390, 75 5 0390 and 75 6 090, as of September 30 for fiscal years 1994-1996, are reproduced in the addendum to this brief, along with the declaration of John A. Thompson, HHS's Chief of the Reports and Control Branch, Division of Financial Operations, Programs Support Center, which attests to the authenticity of these documents. Supp. Br. Add. 2a, 4a, 6a-10a.

time during a fiscal year.[3] As is pertinent here, the SF 133's reveal unobligated balances as of September 30 (the close of the fiscal year), of $6,841,390.01, $3,245,545.71, and $1,253,280.64, in 1994, 1995, and 1996, respectively. *See Congressional Appropriations and IHS Expenditures*, Table 1-FY 1994; Table 2-FY 1995; Table 3-FY 1996.[4] Supp. Br. Add. la, 3a, 5a.

Although it appears that there were some unobligated balances in the overall Indian Health Services account during each fiscal year, those amounts-ranging between $1.2 and $6.8 million-accounted for a very small percentage of IHS's

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[3] The funds available in IHS's Treasury accounts fluctuate during the course of the fiscal year due not only to its outlays and disbursements, but also because of reimbursements that IHS receives from the Medicare and Medicaid programs, and from collections it receives from other federal agencies under agreements between IHS and those agencies. *See* 42 U.S.C. §§ 1395qq, 1396j; 31 U.S.C. § 1535. In fact, because IHS receives revenues from these other sources, it may actually obligate and disburse more funds in a given fiscal year than it is appropriated by Congress. However, the funds from these other income sources cannot be reprogrammed to pay CSC. *See* 42 U.S.C. § 1395qq (Medicare funds must be used to comply with Medicare participation requirements); 25 U.S.C. § 1642(a) (Medicaid funds must be used to comply with Medicaid participation requirements); 25 U.S.C. § 1621f(a) (reimbursements from third party insurance earned by IHS must be credited to the IHS and used for the provision of services); 31 U.S.C. § 1536 (Economy Act credits to be used to provide additional services absent statutory authorization). Moreover, after the close of a fiscal year, IHS has five years to make adjustments to satisfy expenses that were incurred during the course of the fiscal year, and that were chargeable to that fiscal year's appropriation account; to account for funds that were deobligated during the fiscal year; and to correct accounting errors. 31 U.S.C. §§ 1552(a), 1553. For this reason, the President's Budget and IHS Budget Justification documents relied on by Cherokee are not helpful in response to the Court's question. *See e.g.*, Appellee's Br. 17 n. 35

[4] For the convenience of the Court, these tables summarize IHS's Indian Health Services expenditures as of the close of the each of the fiscal years at issue.

total budgetary resources, which ranged between approximately $1.3 and $1.38 billion, and result from imperfections in the spending process.[5] Further, as the SF 133's show, a portion of IHS's total budgetary resources were attributable to reimbursements and collections that were not available for payment of CSC.[6] Moreover, the unobligated funds were not sufficient to pay Cherokee and all of the other tribal contractors their full CSC need. Indeed, as the documents relied upon by Cherokee show, at the end of FY 1995, there was a CSC funding shortfall of $21.9 million, with 70 tribal contractors remaining on the ISD queue. And at the close of FY 1996, there was a $42.1 million shortfall, with 104 tribal contractors on the queue. *See* DHHS, IHS, Justification of Estimates for Appropriations Committees, IHS-117 (FY 1998).

As we have argued, Cherokee cites no authority, and indeed there is none, for Cherokee's claim that it was entitled to full immediate payment of its CSC need at the beginning of each fiscal year, ahead of all of IHS's other obligations. *See Cherokee Nation v. Thompson*, 311 F.3d 1054, 1063 & n.7 (10th Cir. 2002), *petition for cert. filed*, No. 02-1472 (U.S. April 3, 2003) (there is no support for the tribes' claim to a superior right to payment, "nor would that make sense, given the structure of the compacts plaintiffs have with the government, as well as the IHS' numerous other mandatory financial obligations"). Moreover, as we demonstrate below, Cherokee's claim of entitlement to additional payment from

[5] As explained earlier (*see* n. 3, *supra*), there is also a five-year "adjustment" period during which the unobligated balances may fluctuate.

[6] IHS's duty to provide CSC is conditioned on the availability of appropriated funds, 25 U.S.C. § 450j-l(b), and not on the happenstance that the facilities IHS operates to serve non-contracting tribes might earn income from the medical services that they provide to American Indians and Alaska Natives. As noted earlier (*supra*, n.3), the funds from these other income sources cannot be transferred or reprogrammed to pay CSC.

the Indian Health Services appropriations in the relevant fiscal years is moot because the appropriations for those years are no longer available.

B. The Authority to Obligate Appropriations From the Relevant Fiscal Years Has Now Lapsed; Consequently, Cherokee's Claim for Additional CSC Funding for FYs 1994-1996 Is Moot.

In any event, while it appears that IHS had some unobligated appropriation balances remaining at the close of each of the fiscal years at issue, the appropriations for Indian Health Services were "one-year" appropriations, which have now lapsed. *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 304, 107 Stat. 1415 (1993); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996). Thus, those funds are not now available to pay Cherokee (or any other tribes) any additional CSC. 31 U.S.C. § 1301 (c)(2) (an annual appropriation generally may not be construed to be available beyond the specific year of the appropriation unless the appropriation "expressly provides that it is available after the fiscal year covered by the law in which it appears"). *See also City of Houston v. HUD*, 24 F.3d 1421 (D.C. Cir. 1994). As the D.C. Circuit has explained, "'it is an elementary principle of the budget process that, in general, a federal agency's budgetary authority lapses on the last day of the period for which the funds were obligated. At that point, the unobligated funds revert back into the general Treasury.'" *City of Houston*, 24 F.3d at 1426 (quoting *West Va. Ass'n of Community Health Ctrs. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984)). Moreover, "'a federal court cannot order the obligation of funds for which there is no appropriation.'" *Id.* (quoting *Rochester Pure Waters Dist. v. EPA*, 960 F.2d

180, 184 (D.C. Cir. 1992)). Thus, where, as in this case, 'the relevant appropriation has lapsed or been fully obligated . . . the federal courts are without authority to provide monetary relief." *Id.* at 1428.

The D.C. Circuit's decision in *City of Houston* was premised on the constitutionally-based doctrine that Congress, and Congress alone, has the power to direct the expenditure of funds from the Treasury. 24 F.3d at 1428. *See* Art. I, § 9, C1. 7 ("[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . "). The command of the Appropriations Clause is "straightforward and explicit," it "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *OPM v. Richmond*, 496 U.S. 414, 424 (1990) (internal quotation marks and citation omitted).

Cherokee's appeal to the Interior Board of Contract Appeals was not filed until January 27, 1998—well after the close of each of the fiscal years at issue. Its claim of entitlement to any additional CSC funding from the Indian Health Services appropriation for those years is therefore moot. *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 588-89 (D.C. Cir. 1977) ("If. . . .budget authority has lapsed before suit is brought . . ., any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorization in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities."). Because Congress never provided budget authority to pay CSC claims from any source other than the relevant year appropriations, this Court may not order monetary relief in this case.

CONCLUSION

For the foregoing reasons, as well as those urged in our main briefs and at oral argument, the Board's order granting summary judgment in favor of Cherokee should be reversed by this Court.

Respectfully submitted,

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APRIL 24, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April 2003, I caused to be filed copies of the foregoing "Supplemental Brief of Appellant Tommy G. Thompson" with the Clerk, United States Court of Appeals for the Federal Circuit, and served the following counsel by causing copies to be dispatched in the following manner:

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[See JA Vol. II, PART 2 for Addendum]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

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APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

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INTRODUCTION

The Secretary submits this revised supplemental brief in accordance with this Court's order of April 28, 2003, to directly address:

> the amount of funds available during each of the fiscal years 1994, 1995, and 1996 (over and above the amounts not expended by the end of the fiscal year) that were not obligated to other tribes or otherwise restricted and thus could have been used (by reprogramming) to satisfy obligations under the agreements in question here during those fiscal years.

As we discuss below, IHS has examined its financial reports pertaining to the fiscal years at issue, which show that Hopper Decl. ¶ 4 (Rev. Supp. Br. Add. 2a):[1]

> At the beginning of each fiscal year [1994, 1995, and 1996], IHS obligated all of the funds that Congress provided in its lump-sum appropriations for those years, with the exception of some minor unobligated sums. The entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve Tribes, either through self-determination contracts or directly for the operation of Tribal programs by IHS.

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[1] In response to the Court's direction, IHS's current Director of Financial Management, Lovell Hopper, and his staff, examined IHS's financial records and prepared tables summarizing IHS's allocations of its lump sum appropriations for the relevant fiscal years. For the Court's convenience, Mr. Hopper's declaration explaining IHS's allocations, with accompanying tables (Ex. 1), is included in the addendum to this brief. Rev. Supp. Br. Add. 1a-68a. The other exhibits referred to in the declaration as source documentation for the tables are not included at this time due to their bulk (approximately 800 pages); however the Secretary is serving Cherokee counsel's with a copy of the exhibits. If the Court wishes, the Secretary will also provide the Court with copies of these exhibits. In light of the factual nature of this evidence, the Court might find that a limited remand to the Board is necessary.

Thus, as the Hopper declaration and accompanying tables show, there were no funds available during each of the fiscal years 1994, 1995, and 1996, "that were not obligated to other tribes or otherwise restricted and thus could have been used (by reprogramming) to satisfy obligations under the agreements in question here during those fiscal years" (Order of 4/28/03 at 1-2), without the Secretary violating his statutory duty to not take away funding from programs serving other tribes. *See* 25 U.S.C. § 450j-l(b) (""Notwithstanding any other provision of this subchapter. . . the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization") (emphasis added); *see also id.* at 458aaa-l8(b).

This Court should thus join the Ninth and Tenth Circuits in holding that the Secretary was not required to reallocate funds from IHS's over $1 billion lump sum annual appropriations to fund contract support costs (CSC) beyond the amounts Congress indicated - both initially,[2] and later in Section 314[3] - should be spent on this category of expenses. *See Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660, (9th Cir. 2002); *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), petition for cert. filed, No. 02-1472 (U.S. April 3, 2003). As noted in our earlier briefing, the Board denied the Secretary's request for an evidentiary hearing to present evidence detailing how IHS's annual lump sum appropriations were allocated. Because this Court's request for supplemental briefing requires the Secretary's to now provide

[2] *See* H.R. Rep. No. 103-158 at 100, 104 (1993) (recommending $134,686,000 for CSC for ongoing contracts for FY 1994); H.R. Rep. No. 103-551 at 103 (1994) (recommending $145,738,000 for ongoing CSC for FY 1995); H.R. Rep No. 104-173 at 97 (1995) (recommending $153,040,000 for ongoing CSC for FY 1996).

[3] Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 314, 112 Stat. 2681, 2681-288 (1998).

such details, as noted earlier (*supra* n. 1), the Court might find it appropriate to order a limited remand to the Board to permit supplementation and clarification of the record. *But see* Point 3 *infra*.

ARGUMENT

1. *Program Description.*

A brief discussion of the operation of the Indian Health Service (IHS) is helpful in addressing the Court's question. As noted in our main brief (at 6), IHS either directly operates, or enters into self-determination contracts with tribes to operate, approximately 150 health care delivery programs (service units) serving defined geographic areas across the country.[4] Pursuant to the Indian Self-Determination and Education Assistance Act (ISDEA), the Secretary is required to provide funding under self-determination contracts in the same amount that he would have provided if the programs were directly operated by IHS (*i.e.*, the Secretarial amount). *See* 25 U.S.C. § 450j-1 (a)(1).

In addition to its direct care operations, IHS has two levels of administration: (1) IHS Headquarters in Rockville, Maryland; and (2) IHS's regional administration, which is geographically divided into twelve "Areas." IHS's administrative components provide administrative support to all IHS health care programs. One tribe cannot contract to take over the entire administrative component at the IHS Area level

[4] IHS derives its authority to provide health care services to American Indians primarily from two statutes. First, the Snyder Act, 25 U.S.C. § 13, authorizes IHS to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians, "for the" relief of distress and conservation of health." *Id.* Second, the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.*, establishes numerous programs to implement particular Indian health initiatives concerning, for example, alcohol and substance abuse treatment, diabetes, medical training, and urban Indian health.

unless all the tribes in that geographic area agree, because the component serves all of the tribes in a particular geographic area. Similarly, the Headquarters administrative support component serves all the tribes across the nation. Thus, the tribe assumes only the portion or "share" of the administrative component that supports the particular service unit program for which the tribe has contracted. The portion of the Area and Headquarters administrative functions that a tribal organization is entitled to operate is referred to as the "tribal share." Accordingly, the "Secretarial amount" in a given contract includes funds for both the specific service-unit-level health care delivery program for which the tribe has contracted, as well as any associated tribal share-*i.e.*, administrative functions at the Area and/or Headquarters Offices that support the contracted service unit program for which the tribe wishes to contract.

2. *IHS's Allocations in Fiscal Years 1994, 1995, and 1996.*

As our prior briefs (Opening Br.27-28, 37-38; Reply Br.9, 13,16-17, 25) and Mr. Hopper's declaration (¶¶ 6, 13, 22, 33; Rev. Supp. Br. Add. 3a, 6a, 8a, 11a-12a) explain, the Secretary allocates IHS's annual lump sum appropriation in accordance with Congress's committee report recommendations. During each fiscal year, IHS allocates the majority of its lump sum health services appropriation to Area Offices. Hopper Decl. ¶ 8 (Rev. Supp. Add. 4a). The Area Offices in turn divide the funds between the service unit programs that are directly operated by IHS and the service unit programs that are operated by tribes under contract. In addition, Area Offices retain funds for activities at the Area level for the inherently federal (*i.e.*, non-contractable) functions that IHS must carry out as a federal agency, regardless of whether all IHS programs were under contract with tribes. *Id.* The remaining funds at the Area level are used for the support of service unit programs and are subject to contracting by tribes as each tribe's proportionate share of the area level programs.

Id. IHS Headquarters also retains funds to support inherently federal functions for certain activities that are managed by Headquarters, or for programs that are identified as available for contract as tribal shares. *Id.* at ¶ 10 (Rev. Supp. Br. Add. 5a).

The total annual lump sum appropriation represents the specific amounts that fund the numerous health services and programs that IHS directly or indirectly provides. Specifically, IHS allocates its lump sum appropriation to fund services and programs in the following categories (also referred to as sub-sub activities): Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Community Health Representatives, Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, Self-Governance, and Contract Support Costs. Hopper Decl. ¶ 5 (Rev. Supp. Br. Add. 2a-3a).

IHS's total congressional appropriations for Indian health services in fiscal years 1994, 1995, and 1996 were $1,645,877,000,[5] $1,707,092,000,[6] and $1,745,309,000,[7] respectively. Minus the amounts earmarked in the appropriations acts, IHS's total available health services appropriation was $1,288,529,000 for 1994, $1,337,042,218 for 1995, and $1,375,245,000 for 1996. As the Hopper

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[5] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993);

[6] *See* Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499, 2527-28 (1994); Pub. L. No. 103-332,108 Stat. 2537, 2538, § 313; Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-terrorism Initiatives, for Assistance in the Recovery from the Tragedy That Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104-19, 109 Stat. 194, 248, § 2007(a) (1995).

[7] *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189, 1321-380, § 31002(a) (1996).

declaration and supporting tables detail, the entire appropriation for each fiscal year was fully allocated:

- In the 1994 fiscal year, IHS allocated, through the Area Offices and Headquarters combined, $520,445,098 to tribal service units, and $491,953,477 to federal programs serving tribes. In addition, $25,522,460 was retained for inherently federal functions, and $250,607,965 was retained to be available for tribal shares (Hopper Decl. ¶¶ 16-20; Ex. 1). Rev. Supp. Br. Add. 7a, 15a- 17a.
- In the 1995 fiscal year, IHS allocated through the Area Offices and Headquarters combined, $577,186,900 to tribal service units, and $494,361,441 to federal programs serving tribes. In addition, $29,613,574 was retained for inherently federal functions and $235,880,302 was retained to be available for tribal shares (Hopper Decl. ¶¶ 27-31; Ex. 1). Rev. Supp. Br. Add. 10a-11a, 15a-17a.
- In the 1996 fiscal year, IHS allocated, through the Area Offices and Headquarters combined, $616,188,464 to tribal service units and $507,104,763 to federal programs serving tribes. In addition, $35,989,621 was retained for inherently federal functions and $215,962,152 was retained to be available for tribal shares (Hopper Decl. ¶¶ 38-42; Ex. 1). Rev. Supp. Br. Add. 13a-l4a, 15a-17a.

Thus "the entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve Tribes, either through self-determination contracts or directly for the operation of Tribal programs by IHS." Hopper Decl. ¶ 4 (Rev. Supp. Br. Add. 2a). Further, the amounts retained (residuals) for the administration of inherently federal functions ($25,522,460 in FY 1994, $29,613,574 in FY 1995, and $35,989,621 in FY 1996) were non-contractable. Nor

were the amounts retained for tribal shares[8] ($250,607,965 in FY 1994, $235,880,302 in FY 1995, and $215,962,152 in FY 1996) available for reprogramming. Hence, IHS could not have reprogrammed funds already allocated to other tribes or programs to pay Cherokee's full CSC request (and those of all the other tribal contractors nationwide), without violating the statutory mandate against reducing funding from programs serving other tribes. *See* 25 U.S.C. § 450j-l(b); *see also id.* at § 450j(g) (the Secretary is prohibited from making "any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals"); *id.* at § 450j-1 (b)(2) (once funds are provided to a tribe under a self-determination contract, they shall not be reduced "in subsequent years"); *id.* at § 450j(i) ("[n]othing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable Federal law").

3. *Mootness.*

As indicated in our earlier supplemental brief (at 3-4 & n.3), it appears that some of the funds allocated by IHS during each fiscal year had not been "obligated" (*see* 31 U.S.C. § 1501) by the close of the fiscal year. We explained, however, that the appropriation account remains available for five years for recording, adjusting, and liquidating obligations properly chargeable to that fiscal year appropriation account. *See* 31 U.S.C. §§ 1552(a), 1553.

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[8] A tribe may contract or compact only its share of these retained funds supporting Headquarters' administrative support functions. Those tribal shares which are contracted or compacted are distributed to the appropriate tribes. However, those tribal shares for tribes served directly by the IHS are retained by Headquarters to fund administrative support services for those Tribes, and may not be reprogrammed for other tribes.

Moreover, as we discussed further (Supp. Br. 6-8), the "one-year" appropriations[9] for Indian Health Services for the fiscal years in question have now lapsed and there is, therefore, no source of funds available to pay Cherokee's claim. 31 U.S.C. § 1301(c)(2); *see also City of Houston v. HUD*, 24 F.3d 142,14261 (D.C. Cir. 1994). Indeed Congress, exclusively, has the power to direct the expenditure of funds from the Treasury. *See* Art. I, § 9, C1.7 ("[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ."); *see also OPM v. Richmond*, 496 U.S. 414, 424 (1990); *City of Houston*, 24 F.3d at 1428.

Because Cherokee's appeal to the Interior Board of Contract Appeals was not filed until January 27, 1998 - well after the close of each of the fiscal years at issue, its claim of entitlement to any additional CSC funding from the Indian Health Services appropriation for those years is moot. *National Ass 'n of Regional Councils v. Costle*, 564 F.2d 583, 588-89 (D.C. Cir. 1977). As Congress never provided budget authority to pay CSC claims from any source other than the relevant year appropriations, this Court may not order monetary relief in this case.

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[9] *See* Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, § 304,107 Stat. 1415 (1993); Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, § 304, 108 Stat. 2536 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 304, 110 Stat. 1321-196 (1996).

CONCLUSION

For the foregoing reasons, as well as those urged in our main and supplemental briefs, and at oral argument, the Board's order granting summary judgment in favor of Cherokee should be reversed by this Court.

Respectfully submitted,

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MAY 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2003, I caused to be filed copies of the foregoing "Revised Supplemental Brief of Appellant Tommy G. Thompson" with the Clerk, United States Court of Appeals for the Federal Circuit, and served the following counsel by causing copies to be dispatched in the following manner:

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/s/ JEFFRICA JENKINS LEE
JEFFRICA JENKINS LEE
Attorney for the Appellant

Index

Declaration of Lovell Hopper, executed
May 12, 2003,..... 1a
Exhibit 1 ..... 15a

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 02-1286

TOMMY G. THOMPSON, Secretary of Health and Human Services,
Appellant,

v.

CHEROKEE NATION OF OKLAHOMA,
Appellee.

APPEAL FROM THE DEPARTMENT OF INTERIOR BOARD OF CONTRACT APPEALS IN NOS. 3877-3879/89 ADMINISTRATIVE JUDGE BERNARD V. PARRETTE

I, Lovell Hopper, declare as follows:

1. I am currently employed as the Director of the Division of Financial Management ('DFM") for the Indian Health Service ("IHS"). I have been in this position since July 30, 2000. From May 1996 until July 2000, I was employed by IHS as the Director of Financial Management for the Phoenix Area office of the IHS. In my current position as the Director of Financial Management, my primary responsibilities are management and oversight of issues related to budget formulation, budget execution, financial systems, and audit of the Indian Health Service.

2. This declaration is based on my personal knowledge and on information that I obtained in the course of my employ-

ment. In the event that I am called as a witness, I could competently testify to the facts contained in this declaration.

3. The allocation amounts in this declaration are taken from documents that the IHS Division of Financial Management and the Area Office Financial Management Officers keep in the ordinary course of business. At my direction, Headquarters Division of Financial Management staff prepared tables summarizing these allocations which are attached as Exhibit 1. The original documents are also attached as Exhibits 3 through 19.

4. IHS' total appropriations from Congress for Indian health services in fiscal years 1994, 1995, and 1996 were $1,645,877,000, $1,707,092,000, and $1,745,309,000, respectively. At the beginning of each fiscal year IHS obligated all of the funds that Congress provided in its lump-sum appropriations for those years, with the exception of some minor unobligated sums. The entire annual lump-sum appropriation for each of these fiscal years, *i.e.*, both the obligated and unobligated funds, was allocated for programs that serve tribes, either through self-determination contracts or directly for the operation of tribal programs by IHS.

5. The total annual lump sum appropriation is the sum of specific amounts for the many health services and programs that IHS directly or indirectly provides. These services and programs fall into the following categories:

> Hospitals and Clinics, Dental, Mental Health, Alcohol and Substance Abuse, Public Health Nursing ("PHN"), Health Education, Community Health Representatives ("CHR"), Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, Self-Governance, and Contract Support Costs. These categories are known as sub-sub activities.

6. Before Congress appropriated funding to IHS for these services, it approved them during the budget process as

appropriate purposes for IHS' expenditure of the funding. IHS submitted these proposed services for Congress' review in the so-called Congressional Justifications, by which IHS explains its budget request to Congress prior to the start of the fiscal year. The services were also brought to Congress' attention as a result of being included in the budget that the president submitted to Congress for these fiscal years. Then, when Congress actually appropriated the money requested in the budget, it specifically listed the funding for the various services for which the appropriation was intended by sub-sub activity in its Appropriation Committee Reports.

7. The amounts listed in the Congressional Justifications for IHS' health services are usually less than IHS originally sought. The reason for the reduction is that IHS' funding needs are reviewed and reduced during the budgeting process. IHS submits its original budget request to HHS, which usually reduces it because of competing interests within HHS. HHS, in turn, submits the request to OMB, which usually reduces it further due to competing interests within the government. Finally, the request is incorporated into the President's budget request to Congress, in which IHS' request for funding is set forth in the Congressional Justifications. At that point Congress appropriates only as much money as it sees fit. For example, in 1996, in the Congressional Justification, IHS requested $161,174,000 in contract support costs but ultimately was allocated only $153,040,000. *See* Exh. 2. In other words, IHS cannot request an unlimited amount of funding and reasonably expect ultimately to receive it from Congress.

8. Each year, IHS allocates most of the lump sum appropriation to Area Offices. The Area Offices then divide these funds between the service unit programs that are operated by IHS and the service unit programs that are operated by tribes under contract. Usually, both the federally-operated and tribally-operated service unit programs receive

the same base funding as in prior years, plus their share of any program increases. Area offices also retain funds for activities at the area level that are inherently federal functions IHS needs to carry out as a federal agency even if all IHS programs were to be contracted or compacted by tribes. The rest of the funds at the area level are for support of service unit programs and are subject to contracting or compacting by tribes as each tribe's proportionate share of the area level programs. The funds which are available for contract are known as "tribal shares." Each tribe in the Area, contracting or non-contracting, has an identified tribal share amount that cannot be contracted for by another tribe.

9. During fiscal years 1994 through 1996, most of the self-governance tribes received payment directly from Headquarters, unlike the self-determination tribes who received payment from the Areas. These compact funds had been adviced to the self-governance sub-sub activity from the other program activities, including contract support costs, for payment to the self-governance tribes.

10. IHS Headquarters also retains funds for certain other activities that are managed at the Headquarters level. These funds either support inherently federal functions that are not available for contract, or programs that are identified as available for contract or compact by tribes as tribal shares. Each tribe, contracting or non-contracting, has an identified headquarters tribal share amount, that cannot be contracted for by another tribe.

Fiscal Year 1994

11. In fiscal year 1994, IHS received a total appropriation of $1,645,877,000 for health services. Of this amount, the appropriation act earmarked $337,848,000 for contract health services, $12,000,000 for the catastrophic health emergency fund ("CHEF"), $11,526,000 for the student loan repayment program for medical professionals, and $7,500,000 for the

Indian Self- Determination ("ISD") Fund. *See* Pub. L. No. 103-138, 107 Stat. 1379, 1408 (1993).

12. Unlike the other amounts earmarked by the Appropriation Act, the loan repayment earmark was made available for obligation for one year only, and consequently was apportioned, allocated, obligated, and expended in the one-year account along with the balance of the health services appropriation.

13. In the Appropriation Committee Reports, Congress divided the remaining amount, $1,277,003,000, plus the $11,526,000 for loan repayment, by sub-sub activity as follows: $799,363,000 for Hospitals and Clinics, $53,151,000 for Dental, $35,272,000 for Mental Health, $87,617,000 for Alcohol and Substance Abuse, $22,187,000 for PHN, $7,919,000 for Health Education, $43,010,000 for CHR, $1,348,000 for Immunization, $22,834,000 for Urban Health, $27,406,000 for Indian Health Professions (includes $11,526,000 for loan repayment), $5,285,000 for Tribal Management, $49,471,000 for Direct Operations, $4,980,000 for Self-Governance, and $128,686,000 for Contract Support Costs. *See* Exhibit 3.

14. IHS Headquarters allocated all of the $1,288,529,000 either to the Areas or to Headquarters.

15. IHS allocated $1,121,734,778 to the Areas by sub-sub activity as follows: $722,096,145 for Hospitals and Clinics, $51,559,483 for Dental, $32,167,094 for Mental Health, $82,880,325 for Alcohol and Substance Abuse, $21,384,851 for PHN, $7,599,437 for Health Education, $39,807,100 for CHR, $1,348,000 for Immunization, $15,629,225 for Urban Health, $605,400 for Indian Health Professions, $100,000 for Tribal Management, $22,905,188 for Direct Operations, $1,244,460 for Self-Governance, and $122,408,070 for Contract Support Costs. *See* Exhibit 4.

16. The twelve IHS areas in turn allocated all of the $1,121,734,778 that had been allocated to them between tribal contracts, federally operated health service units, and Area Office programs. In fiscal year 1994, the Areas allocated a total of $476,611,818 to tribes and $491,953,477 to federal service units by sub-sub-activity. *See* Exhibits 1 and 5.

17. The Area Offices retained $153,169,483 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 5, and 6.

18. In fiscal year 1994, IHS allocated $166,794,222 to Headquarters. *See* Exhibits 1 and 4.

19. IHS Headquarters distributed $44,299,755 to tribes and Urban programs by sub-sub activity as follows:

Urban Health: $6,666,075 to urban programs;
Tribal Management: $5,104,485 to tribal programs;
Contract Support Costs: $24,900 to tribal programs;
Self-Governance: $32,594,295 to tribal programs.

See Exhibits 1 and 7.

20. IHS Headquarters divided the remaining $122,494,467 between inherently federal functions and amounts identified for headquarters tribal shares that support area and service unit level programs whether operated by IHS or Tribes. *See* Exhibits 1 and 8.

Fiscal Year 1995

21. In fiscal year 1995, Congress initially appropriated $1,713,052 for health services. Of this amount, $351,258,000 was earmarked for contract health services, $12,000,000 was

earmarked for CHEF, $11,603,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 103-332, 108 Stat. 2499, 2527-28 (1994).

22. In the Appropriation Committee Reports, Congress divided the remaining amount, $1,318,691,000 plus the $11,603,000 for loan repayment, by sub-sub activity as follows: $825,442,000 for Hospitals and Clinics, $57,628,000 for Dental, $36,518,000 for Mental Health, $91,527,000 for Alcohol and Substance Abuse, $23,550,000 for PHN, $8,260,000 for Health Education, $44,039,000 for CHR, $1,331,000 for Immunization, $23,394,000 for Urban Health, $28,098,000 for Indian Health Professions (includes $11,603,000 for loan repayment), $5,358,000 for Tribal Management, $49,804,000 for Direct Operations, $9,107,000 for Self-Governance, and $138,238,000 for Contract Support Costs. *See* Exhibit 9.

23. After Congress enacted a reduction and a rescission, IHS received a total appropriation of $1,707,092,000 for health services. Of this amount, $350,564,000 was earmarked for contract health services, $12,000,000 was earmarked for CHEF, $11,488,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 103-332, 108 Stat. 2537, 2538 § 313 (1994); Pub. L. No. 104-19, 109 Stat. 194, 248 § 2007(a)(1995).

24. IHS applied the rescission to the remaining amount, $1,337,042,218, which includes the $11,488,000 for loan repayment, by sub-sub activity as follows: $822,538,000 for Hospitals and Clinics, $57,518,000 for Dental, $36,448,000 for Mental Health, $91,352,000 for Alcohol and Substance Abuse, $23,505,000 for PHN, $8,244,000 for Health Education, $43,955,000 for CHR, $1,329,000 for Immunization, $23,349,000 for Urban Health, $27,479,000 for Indian Health Professions (includes loan repayment), $5,048,000 for Tribal Management, $49,709,000 for Direct Operations, $8,594,000 for Self-Governance, and $137,960,000 for

Contract Support Costs. These amounts are slightly less than the total due to rounding. *See* Exhibits 10 and 11.

25. IHS Headquarters allocated all of the $1,337,042,218 either to the Areas or to IHS Headquarters.

26. IHS allocated $1,026,027,578 to the Areas by sub-sub activity as follows: $687,294,592 for Hospitals and Clinics, $51,411,582 for Dental, $30,096,534 for Mental Health, $75,955,270 for Alcohol and Substance Abuse, $20,892,337 for PHN, $6,663,366 for Health Education, $34,696,489 for CHR, $1,098,058 for Immunization, $15,978,150 for Urban Health, $735,433 for Indian Health Professions, $11,800 for Tribal Management, $21,140,012 for Direct Operations, $93,950 for Self-Governance, and $79,960,005 for Contract Support Costs. *See* Exhibits 1 and 12.

27. The twelve IHS Areas in turn distributed the funds that had been allocated to them for obligation to tribal contracts and use by federally operated health programs. In fiscal year 1995, the Areas distributed $385,655,358 to tribes and $494,361,441 to federal programs by sub-sub activity. *See* Exhibits 1 and 13.

28. The Areas retained $146,969,857 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 13-14.

29. In fiscal year 1995, IHS allocated $311,014,640 to Headquarters for Headquarters managed activities. *See* Exhibits 1 and 12.

30. IHS Headquarters distributed $191,625,367 to tribes and Urban programs by sub-sub activity as follows:

Urban Health: $6,764,992 to urban programs;
Tribal Management: $5,035,966 to tribal programs;
Contract Support Costs: $320,192 to tribal programs;
Self-Governance: $179,504,217 to tribal programs.

See Exhibits 1 and 15.

IHS Headquarters divided the remaining $119,389,273 between inherently federal functions and amounts identified for headquarters tribal shares that support area and service unit level programs whether operated by IHS or tribes. *See* Exhibits 1 and 16.

Fiscal Year 1996

32. In fiscal year 1996, Congress initially appropriated $1,747,842,000 for IHS for health services, of which the appropriation act earmarked $350,564,000 for contract health services, $12,000,000 for CHEF, $11,306,000 for loan repayment, and $7,500,000 for the ISD Fund. *See* Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996).

33. In the Appropriation Committee reports, Congress divided the remaining amount, $1,366,472,000 plus the $11,306,000 for loan repayment by sub-sub activity as follows: $852,435,000 for Hospitals and Clinics, $59,680,000 for Dental, $37,561,000 for Mental Health, $91,666,000 for Alcohol and Substance Abuse, $24,311,000 for PHN, $8,421,000 for Health Education, $43,958,000 for CHR, $1,328,000 for Immunization, $23,360,000 for Urban Health, $26,271,000 for Indian Health Professions, $2,348,000 for Tribal Management, $49,260,000 for Direct Operations, $9,104,000 for Self-Governance, and $145,540,000 for Contract Support Costs. *See* Exhibit 17.

34. After a rescission, IHS received a total appropriation of $1,745,309 for health services. Of this amount, $350,564,000

was earmarked for contract health services, $12,000,000 was earmarked for CHEF, $11,306,000 was earmarked for loan repayment, and $7,500,000 was earmarked for the ISD Fund. *See* Pub. L. No. 104-134, 110 Stat. 1321-380, § 31002(a) (1996).

35. In its request for apportionment, IHS divided the remaining amount, $1,363,939,000, plus $11,306,000 for loan repayment, by sub-sub activity as follows: $854,478,000 for Hospitals and Clinics, $59,770,000 for Dental, $37,200,000 for Mental Health, $91,352,000 for Alcohol and Substance Abuse, $24,150,000 for PHN, $8,313,000 for Health Education, $43,955,000 for CHR, $1,328,000 for Immunization, $23,768,000 for Urban Health, $26,244,000 for Indian Health Professions, $2,348,000 for Tribal Management, $47,709,000 for Direct Operations, $9,090,000 for Self-Governance, and $145,540,000 for Contract Support Costs. *See* Exhibit 18.

36. IHS Headquarters allocated all of the $1,375,245,000 to the Areas and Headquarters.

37. IHS Headquarters allocated $1,109,395,055 to the Areas by sub-sub activity as follows: $690,248,871 for Hospitals and Clinics, $51,370,796 for Dental, $30,590,839 for Mental Health, $75,952,586 for Alcohol and Substance Abuse, $21,362,682 for PHN, $6,570,553 for Health Education, $34,712,822 for CHR, $918,954 for Immunization, $16,366,850 for Urban Health, $505,330 for Indian Health Professions, $25,600 for Tribal Management, $20,302,201 for Direct Operations, $71,396,152 for Self-Governance, and $89,070,819 for Contract Support Costs. *See* Exhibit 19.

38. The twelve IHS Areas in turn distributed the funds that had been allocated to them to tribal contracts and federally operated health programs. In fiscal year 1996, the Areas

distributed $467,336,098 to tribes and $507,104,763 to federal programs by sub-sub activity. *See* Exhibits 1 and 20.

39. The Areas retained $134,954,194 for area level functions, which either supported inherently federal functions, also known as residual functions, or were available for tribal shares. Some Area Offices had identified the level of funding necessary to carry out residual functions, and had identified the balance as area shares for tribes. Other Areas had not yet established what level of funding was necessary to support residual functions. *See* Exhibits 1, 20, and 21.

40. IHS allocated $265,849,945 to Headquarters for Headquarters managed activities.

41. IHS Headquarters distributed $148,874,208 to tribal and Urban programs by sub-sub activity as follows:

Urban Health: $6,795,850 to urban programs;
Tribal Management: $2,321,225 to tribal programs;
Self-Governance: $139,757,133 to tribal programs.

See Exhibits 1 and 22.

42. IHS Headquarters divided the remaining $116,975,737 between inherently federal functions and headquarters tribal shares that support area and service unit level programs whether operated by IHS or tribes. *See* Exhibits 1 and 23.

Shortfalls in Contract Support Cost Funding
for New and Expanded Programs

43. In its budget justification for fiscal year 1998, IHS reported contract support cost shortfalls from fiscal year 1995 of $21,900,000 in unpaid requests for funding for new and expanded programs in the ISD queue over and above the $7,500,000 appropriated for the ISD Fund; and for fiscal year 1996, IHS reported $34,600,000 in unpaid requests for finding for new and expanded programs in the ISD queue over and above the $7,500,000 appropriated for the ISD Fund. *See* Exhibit 24.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 12, 2003

/s/Lovell Hopper
LOVELL HOPPER

[See JA Vol. II, PART 2 for Exhibit 1 to Declaration of Lovell Hopper]